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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

EDWARD L. TULL and LOUISE A. TULL, his wife,
Petitioners,

v.

COMMONWEALTH OF VIRGINIA

and

BOARD OF SUPERVISORS OF ACCOMACK COUNTY, VIRGINIA,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Virginia

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fifth Amendment applicable to the States through the Fourteenth Amendment allows denial of just compensation by including non-regulated upland property into the "relevant calculus", when just compensation would be required if the "parcel as a whole" were limited to the regulated wetlands and permit denial prohibited all economic viable use of the wetland property which must remain forever in its natural state.

PARTIES

The plaintiff-appellants below were individuals, Edward L. Tull and Louis A. Tull, his wife. The defendant-appellees below were the Commonwealth of Virginia and the Board of Supervisors of Accomack County, Virginia.

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No. ———

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Edward L. Tull and Louis A. Tull, his wife respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Virginia entered in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Virginia finding no error and refusing the Petition for Appeal is unreported and appears at Appendix ("App.") 1a. The Final Decree of the Circuit Court of Accomack County, Virginia is unreported and appears at App. 2a. The findings of fact and conclusions of law of the Circuit Court of Accomack County, Virginia appear at App. 4a.

JURISDICTION

The judgment of the Supreme Court of Virginia was entered on March 3, 1992. App. 1a. A timely-filed petition for rehearing (App. 7a) was denied on April 17, 1992. App. 6a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATUTES AND REGULATIONS INVOLVED

The Fifth Amendment, Fourteenth Amendment and relevant provisions of the Virginia Wetlands Statute, Code of Virginia § 62.1-13.1 *et seq.*, Accomack County Wetlands Zoning Ordinance, Virginia Land Subdivision and Development Statute, Code of Virginia § 15.1-465 *et seq.* and the Accomack County Subdivision Ordinance are reprinted at App. 25a.

STATEMENT OF THE CASE

The Supreme Court of Virignia has refused a Petition for Appeal finding no error, notwithstanding that the denial of a permit necessary to use seven residential lots and a commercial parcel, resulted in a loss of all viable economic use of that private property and it must forever remain in its natural state, to further the policy of the State of Virginia and Accomack County to preserve wetlands for the public's use and benefit.

Ocean Breeze Mobil Home Sites Subdivision Section "D" ("Ocean Breeze Subdivision") was approved by Accomack County and recorded in compliance with the Accomack County Zoning and Subdivision Ordinances on January 4, 1985. Stipulations No. 9 and No. 11. Over two and a half years later, the Accomack County Wetlands Board ("Wetlands Board") on September 10, 1987 denied Petitioners, Edward L. Tull and Louise A. Tull ("Tulls") a permit that was needed to fill wetlands to use 7 mobile home lots, a commercial parcel and adjacent roads in Ocean Breeze Subdivision. The stated purpose of the permit denial was the need to protect and

preserve wetlands as a valuable public resource. Tr. 72-73 [1] The Tulls appealed to the Virginia Marine Resources Commission ("VMRC") which on November 5, 1987 affirmed the permit denial of the Wetlands Board. Stipulations No. 12 and No. 13.

Having exhausted their administrative remedies by appealing the Wetlands Board's decision to the VMRC, the Tulls filed their Claim for Compensation for the taking of their property with the VMRC and Comptroller of the Commonwealth pursuant to the requirements of Va. Code § 8.01-192 and § 2.1-2231 *et seq.* Stipulation No. 15. On June 24, 1988 the Tulls' claim was denied by the State of Virginia. Stipulation No. 16. The Tulls also petitioned the Accomack County, Board of Supervisors for compensation for the taking of their property pursuant to the requirements of Va. Code § 15.1-550. Stipulation No. 17. The Tulls' claim for compensation was denied at the Board of Supervisors' meeting on July 20, 1988 and the Tulls were notified of the denial on July 21, 1988.[2] Stipulation No. 18.

After denial of their claim for compensation by both the State of Virginia and Accomack County, the Tulls appealed the denial to the Circuit Court of Accomack County ("trial court"). After overruling Demurrers, Motions for Summary Judgment and Cross Motions for

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[1] The Transcript of Proceedings, in the trial court on June 27 and 28, 1991 are referred to herein as Tr. followed by the page number.

[2] The Tulls have complied with this Court's prerequisite for the Constitutional Claim made here. The Tulls have been denied just compensation for the taking of their property by Accomack County pursuant to Va. Code § 15.1-550 and by the State of Virginia pursuant to Va. Code § 8.01-192 and Va. Code § 2.1-2231 *et seq.* *See, Hudson* v. *Palmer*, 468 U.S. 517, 532 n.12 (1984) and *Williamson Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 195 (1985) (Fifth Amendment claim is mature when state compensatory procedures are pursued and just compensation has been denied). *See also, Lucas* v. *South Carolina Coastal Council*, —— U.S. —— (1992) No. 91-453, June 29, 1992 (Blackmun, J. dissenting) slip op. at 8.

Summary Judgment, a trial was held on June 27 and 28, 1991. After hearing evidence and arguments of counsel the trial court stated its findings from the bench on June 28, 1991:

> "The question is did their depriving Mr. Tull of this permit deprive the landowners of all economic viable use of the property, and I think that's the whole question of the case. As I say, to determine that, I think you've got to decide what is the property in question, or the parcel as a whole . . ." App. 4a.

The trial court rejected the State of Virginia and Accomack County's argument that the "parcel as a whole" was the 43 acres originally conveyed to the Tulls and rejected the Tulls' argument that the individual mobile home lots and commercial parcel, totaling approximately 2 acres, which was the only property subject to the jurisdiction of the Wetlands Board and the requirement of a permit, was the "parcel as a whole". The trial court stated that it is ". . . certainly reasonable to use the Ocean Breeze Section D, the approximately 12 acres that was platted as the parcel as a whole . . ." App. 5a. The trial court held, "I do not find that there has been any loss of economic viable use of the property because the permit was denied as to two acres. For that reason I do not think there has been a taking." App. 5a. The Tulls appealed to the Supreme Court of Virginia which found no error in the trial court's decision. App. 1a.

The facts are straightforward and undisputed. On January 4, 1985 the Subdivision Agent of Accomack County approved the subdivision of 12 acres of an original 43 acres purchased by the Tulls on May 7, 1980 and August 2, 1985 for the price of $5,000 per acre. The approved Final Plat of Ocean Breeze Subdivision was recorded in the land records of Accomack County in Plat Book 28, Page 24. Stipulation No. 9. The Accomack County Subdivision Agent confirmed that the Subdivision Plat met all the requirements of the State Subdivision

Statute and Accomack County Subdivision Ordinance. *See* App. 31a and 46a. The lots in the subdivision are platted for mobile home lots and do not qualify for any other use under the Accomack Zoning and Subdivision Ordinances. Tr. 66-67. When the Tulls recorded the Subdivision Plat they were required to, and did, bond the completion of sewage facilities, water facilities, and roads pursuant to the requirements of Accomack County. Tr. 87. In reliance upon the Subdivision Plat and Bond the Tulls expended, in addition to the $60,000.00 in land costs, $10,598.50 for surveying and engineering, $42,169.73 to install central water, $64,234.65 to install central sewer, $26,085.00 to install electric service, and $102,210.00 to install roads. Exhibit "12". *See*, App. 38a and 51a.

Accomack County does not require that a permit to fill wetlands be obtained before subdivision approval. When the Subdivision Plat is recorded the individual lots are removed from the larger parcel and assessed individually.[3] Tr. 93-94. Individual lot assessment cards for the lots located in the wetlands, Lots 39D, 46D, 47D, 51D, 52D, 53D, 54D and the commercial parcel were prepared by the County Assessor. Tr. 94-97. The mobile home lots at issue here were initially assessed after recordation of the Subdivision Plat at $10,000 per lot and at time of trial were assessed at $12,000 per lot. Tr. 99. Wetlands in Accomack County are assessed between $60 to $100 per

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[3] The Virginia statute which controls the zoning and subdivision of land defines a subdivision at Va. Code § 15.1-430(*l*) as:

"(*l*) 'Subdivision' unless otherwise defined in a local ordinance adopted pursuant to § 15.1-465, *means the division of a parcel of land into three or more lots or parcels of less than five acres each for the purpose of transfer of ownership or building development*, or, if a new street is involved in such division, any division of a parcel of land. The term includes resubdivision and, when appropriate to the context, shall relate to the process of subdividing or to the land subdivided and solely for the purpose of recordation of any single division of and into two lots or parcels, a plat of such division shall be submitted for approval in accordance with § 15.1-475." *See*, App. 31a and 49a (emphasis added).

acre. Tr. 99-100. The Tulls have been taxed for the seven mobile home lots and commercial parcel that are the subject of the wetland permit denial, based upon the reassessment after recordation of the Subdivision Plat and have paid the taxes each year on this land. Tr. 112-114.

Over two and half years later the Tulls applied to the Wetlands Board, to fill Lots 39D, 46D, 47D, 51D, 52D, 53D and 54D, the adjacent roads and commercial parcel. Tr. 67. The Tulls permit application was denied on September 10, 1987. Stipulation No. 11. The permit was denied to protect and preserve the wetlands on the Tulls' private property as a valuable public resource in accordance with the explicit policy of the Virginia Wetlands Act.[4] The permit denial was appealed to the

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[4] Va. Code § 62.1-13.1. Declaration of policy. *The Commonwealth of Virginia hereby recognizes the unique character of the wetlands, an irreplaceable natural resource which, in its natural state, is essential to the ecological systems of the tidal rivers, bays and estuaries of the Commonwealth.* This resource is essential for the production of marine and inland wildlife, waterfowl, finfish, shellfish and flora; is valuable as a protective barrier against floods, tidal storms and erosion of the shores and soil within the Commonwealth; is important for the absorption of silt and of pollutants; and *is important for recreational and aesthetic enjoyment of the people for the promotion of tourism, navigation and commerce.* Continued destruction of Virginia's coastal wetlands will greatly contribute to the pollution of the Commonwealth's rivers, bays and estuaries; will diminish the abundance of Virginia's marine and inland animals and waterfowl, finfish, shellfish and flora *as sources of food, employment and recreation for the people of Virginia; will increase costs and hazards associated with floods and tidal storms; and will accelerate erosion and the loss of lands productive to the economy and the well-being of our citizens.*

Therefore, in order to protect the public interest, promote the public health, safety and the economic and general welfare of the Commonwealth, and to protect public and private property, wildlife, marine fisheries and the natural environment, it is declared to be the public policy of this Commonwealth to preserve the wetlands and to prevent their despoliation and destruction and to accommodate

VMRC, pursuant to the appeal rights granted by the Ordinance and Statute. The VMRC on November 5, 1987 voted to uphold the decision of the Wetlands Board. Stipulations No. 12 and 13. It was conceded that without the permit to fill the seven mobile home lots, commercial parcel and adjacent roads, they could not be used. Commonwealth's Motion and Memorandum for Summary Judgment, at 11.

Mr. Eugene Mason was accepted by the trial court as an expert in the field of real estate appraisals. Tr. 34. Mr. Mason's real estate appraisal for the seven mobile home lots and commercial property demonstrated that the property for which the permit was denied had a value of between $150,000 to $179,500 with the permit and a value of only $150 after the permit denial. Tr. 36 and Exhibit "14". Based on this appraisal the property subject to jurisdiction of the Wetlands Board and VMRC was worth only .001 percent of its value, as a result of the denial of the permit to fill the property.

After entry of the Final Decree by the trial court, (App. 2a) denying compensation the Tills timely filed their Petition for Appeal to the Supreme Court of Virginia. The Petition for Appeal asserted as error in the Final Decree both the State Constitutional Claims (Count I) (App. 13a) and the Federal Constitutional Claims (Count II). App. 22a. On March 3, 1992 the Virginia Supreme Court refused the Tulls' Petition for Appeal being of the ". . . opinion there is no reversible error in the judgment complained of." App. 1a. The Tulls timely filed Petition for Rehearing (App. 7a) was denied by the Supreme Court of Virginia on April 17, 1992. App. 6a. The Tulls' Petition for Writ of Certiorari is based solely upon their Federal Constitutional Claims.

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necessary economic development in a manner consistent with wetlands preservation. *See*, App. 25a and 28a (emphasis added).

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to resolve the confusion in "takings" jurisprudence that has resulted since the Court pronounced the term "parcel as a whole" in *Penn. Central Transp. Co.* v. *City of New York*, 438 U.S. 104 (1978). This important question of federal law should be settled by this Court, not erroneously by the Supreme Court of Virginia. The Supreme Court of Virginia has decided this important federal question in conflict with some of the decisions of other State Courts of last resort and some of the decisions of the United States Court's of Appeal. This case also offers the opportunity to settle the question which could not be answered in *Lucas* v. *South Carolina Coastal Council*, —— U.S. —— (1992) No. 91-453, slip op. (June 29, 1992). ("Lucas") which ". . . has produced inconsistent pronouncements by the Court" and resulted in inconsistent pronouncements in other courts which have been called upon to determine what property should be included in the "relevant calculus" to constitute the "parcel as a whole".[5]

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[5] *See, Lucas* slip op. at 11 n.7. "Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, *it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole.* (For an extreme-and, we think unsupportable-view of the relevant calculus, see *Penn Central Transportation Co.* v. *New York City*, 42 N.Y. 2d 324, 333-334, 366 N.E. 2d 1271, 1276-1277 (1977) aff'd. 438 U.S. 104 (1978), where the state court examined the diminution in a particular parcel's value produced by a municipal ordinance in light of total value of the taking claimant's other holdings in the vicinity.) Unsurprisingly, this uncertainty regarding the composition of the denominator in our "deprivation" fraction has produced inconsistent pronouncements by the Court. Compare, *Pennsylvania Coal Co.* v.

1. Petitioners Were Entitled To Just Compensation.

The Supreme Court of Virginia has denied the Tulls the promise of this Court that ". . . when a permit is denied and the effect of denial is to prevent 'economically viable' use of *the land in question*, . . . a taking has occurred." *United States* v. *Riverside Bayview Homes*, 474 U.S. 121, 127 (1985) ("Riverside Bayview") (emphasis added). There is no dispute that the Tulls' permit request was denied, that they cannot use the property subject to that permit denial for any economically viable use and that this "private property" is, because of the permit denial, required to remain forever as vacant and unimproved property to further the State's policy of protection and preservation of wetlands as a "public resource". *See*, Va. Code § 62.1-13.1, *supra* at n.4. The permit denial has converted the Tulls' "private property" into "public property".

The question presented to this Court is whether "the land in question" referred to in *Riverside Bayview*, and referred to in other cases of this Court as the "parcel as a whole", may constitutionally include both regulated and non-regulated property in the "relevant calculus". *See*, *supra* at n.5. But for the inclusion of the Tulls' non-regulated property into the "relevant calculus", the Tulls fall squarely within this Court's requirement of just compensation, stated by this Court as the ". . . second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land." *Lucas*, *supra*, slip op. at 10 (citations omitted).

Mahon, 260 U.S. 393, 414 (1922) (law restricting subsurface extraction of coal held to affect a taking), with *Keystone Bituminous Coal Assn.* v. *DeBenedictis*, 480 U.S. 470, 497-502 (1987) (nearly identical law held not to effect a taking); see also *id.*, at 515-520 (Rehnquist, C.J., dissenting); Rose, *Mahon* Reconstructed: Why the Takings Issue is Still a Muddle, 57 S.Cal. L.Rev. 561, 566-569 (1984). . ." (emphasis added).

The decision below is in error because the "relevant calculus" must be restricted to the seven mobile home lots and commercial parcel located upon the approximately two acres which was subject to the jurisdiction of the Wetlands Board and the requirement of a permit to fill, not, as the trial court held and the Supreme Court of Virginia affirmed, the entire 12 acres of the Ocean Breeze Subdivision. Because the 10 acres of upland property was not subject to the jurisdiction of the Wetland Statute and requirement of a permit, it could not be taken for public use without just compensation by the permit denial and is therefore excluded from the Fifth Amendments prohibition and also from the "relevant calculus". Any other result would make the just compensation requirement of the Fifth Amendment, applicable to the States by the Fourteenth Amendment, dependent upon the *extent* of a private property owner's holdings. The posture of this case and the total deprivation of the use and value of the regulated property suffered by the Tulls present, we believe, an opportunity for the Court to address this important constitutional issue unfettered by the procedural concerns expressed in *Lucas*.[6]

In the landmark case of *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 93, 413 (1992), ("Pennsylvania Coal"), Justice Holmes observed that ". . . the statute is admitted to destroy *previously existing rights of property* and contract." (emphasis added) The property right was the existing right to mine coal when the owner of the right

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[6] *See, Lucas, supra* (Souter, J. abstaining), slip op. at 3. "While the issue of what constitutes total deprivation deserves the Court's attention, as does the relationship between nuisance abatement and such total deprivation, the Court should confront these matters directly. Because it can neither do so in this case, nor skip over those preliminary issues and deal independently with defenses to the Court's categorical compensation rule, the Court should dismiss the instant writ and await an opportunity to face the total deprivation question squarely. Under these circumstances, I believe it proper for me to vote to dismiss the writ, despite the Court's contrary preference." (citations omitted).

did not own the "surface estate" which had been conveyed with a reservation of the right to mine the underlying coal. As the Court stated, "It purports to abolish what is recognized in Pennsylvania as an estate in land, —a very valuable estate, . . .". *Id.* at 414. While terms such as "relevant calculus", "takings calculus", "the land in question" and "parcel as a whole" are not found in *Pennsylvania Coal* the Court clearly was limiting its focus on only the regulated coal. *See, Id.* at 414.

Acknowledging the accepted rule that "Government hardly could go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law" (*Id.* at 413), Justice Holmes correctly predicted the end result when that general rule is unrestricted.[7] Under Justice Holmes' analysis, the Tulls' case clearly requires an exercise of eminent domain and compensation. The Commonwealth of Virginia and Accomack County have completely denied the Tulls all use of all the property subject to their jurisdiction. It cannot be seriously argued that without the inclusion of nonregulated property into the "relevant calculus" for the trial court's determination of the "parcel as a whole", compensation would be required. The requirement of compensation was again affirmed by this Court in *Lucas*, but of course that case did not involve the combination of non-regulated property with regulated property, in the "relevant calculus", to deny just compensation. However, this Court did in *Lucas* leave little doubt that when the State requires private property to be left in its natural state, for public benefit, compensation is required.[8]

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[7] "Obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends on the particular facts." *Id.* at 413.

[8] *Lucas*, slip op. at 12-13. "On the other side of the balance, affirmatively supporting a compensation requirement, is the fact

Confusion as to what constitutes the "relevant calculus" was introduced in 1987, however, when the Court discussed New York City's Landmarks Preservation Law and held that a regulatory taking which required compensation did not exist, when viewed in the context of the "parcel as a whole". The Court rejected as untenable the Appellants' submission that they "may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development".[9] The "parcel as a whole" in "taking" jurisprudence, was born in

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that regulations that leave the owner of land without economically beneficial or productive options for its use-typically, as here, by requiring land to be left substantially in its natural state-carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm. See, e.g., *Annicelli* v. *South Kingstown*, 463 A.2d 133, 140-141 (R.I. 1983) (prohibition on construction adjacent to beach justified on twin grounds of safety and "conservation of open space"); *Morris County Land Improvement Co.* v. *Parsippany-Troy Hills Township*, 40 N.J. 539, 552-553, 193 A.2d 232, 240 (1963) (prohibition on filling marshlands imposed in order to preserve region as water detention basin and create wildlife refuge). As Justice Brennan explained: "From the government's point of view, the benefits flowing to the public from preservation of open space through regulation may be equally great as from creating a wildlife refuge through formal condemnation or increasing electricity production through a dam project that floods private property." *San Diego Gas & Elec. Co., supra*, at 652 (Brennan, J., dissenting). The many statutes on the books, both state and federal, that provide for the use of eminent domain to impose servitudes on private scenic lands preventing developmental uses, or to acquire such lands altogether, suggest the practical equivalence in this setting of negative regulation and appropriation."

[9] "*On this record*, we conclude that the application of New York City's Landmarks Law has not effected a "taking" of appellants' property. The restrictions imposed are substantially related to the promotion of the general welfare and *not only permit reasonable beneficial use of the landmark site but also afford appellants opportunities further to enhance not only the Terminal site proper but also other properties.*" *Id.* at 138 (emphasis added).

Penn Central Transp. Co. v. *City of New York*, 438 U.S. 104, 130-131 (1978) ("Penn Central").[10]

In *Penn Central*, the "landmark site" was defined by statute. It was, "An improvement parcel or part thereof *on which is situated a landmark and any abutting improvement parcel or part thereof used as and constituting part of the premises on which the landmark is situated* . . ." *Id.* at 111, n.10. (emphasis added). While the Court's use of the term "parcel as a whole" in *Penn Central* was clearly limited to the city tax block designated as the landmark site and the individual sticks to the bundle of property rights which *related solely to the landmark site*, numerous State and Federal courts have since this decision construed the Court's pronouncement of the "parcel as a whole" to require the inclusion of non-regulated property with regulated property in the "relevant calculus". Apparently overlooking the statutory definition in *Penn Central* that only "any abutting improvement parcel or part thereof" that "is used as and constituting part of the premises on which the landmark is situated", many courts have felt compelled to include abutting, adjacent and contiguous non-regulated property into the "relevant calculus". Notwithstanding that this Court never held or implied that other non-regulated property owned by Penn Central could be included in the "parcel as a whole" to determine the "relevant calculus", other courts have failed to appreciate either the limiting factors or the factual setting in which the "parcel as a whole" statement was made in *Penn Central.* The Court in *Penn Central*, did not include within the "parcel as a

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[10] " 'Taking' jurisprudence does not divide a single parcel into discreet segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has affected a taking, this Court focuses rather both on the character of the actions and on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the 'landmark site' ". *Id.* at 130-131.

whole" the other eight properties owned by Penn Central in this area of midtown Manhattan.[11]

Confusion may have resulted in the Supreme Court of Virginia and other courts faced with determining the "relevant calculus" because of the Court of Appeals conclusion in *Penn Central* "that the Landmark Law had not affected a denial of due process because; . . .(3) even if the Terminal proper could never operate at a reasonable profit, some of the income from Penn Central's extensive real estate holdings in the area, which include hotels and office buildings, must realistically be imputed to the Terminal. . ." *Id.* at 121. This confusion also appears in the writing of the academic community as well.[12] That issue, however, was never addressed by the

[11] The Court only noted that *Penn Central* by reason of landmark designation had ". . . been denied the right to build above the Terminal, it is not literally accurate to say that they have been denied all use of even those pre-existing air rights. Their ability to use these rights has not been abrogated; they are made transferable to at least eight parcels in the vicinity of the Terminal. . ." *Id.* at 137.

[12] "Even more troubling is the antecedent question of what property is relevant in a takings discussion: how much of what? In *Mahon*, Holmes considered the relevant property to be the entire third estate retained by the Company in its deed, but lost to the Company by operation of the Act. The resulting one hundred percent diminution—no leftover use at all—is the epitome of a taking under a diminution in value test.

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As Brandeis commented, the issue of relevant property is "relative". Indeed, in principle, nothing limits the relevant property to that described in the deed; the Court could have measured the diminution in value against all of the Company's property. *This expansive reading of relevant property appeared recently in the New York Court of Appeals' disposition of Penn Central Transportation Co. v. City of New York. The court apparently calculated the diminution in value caused by New York City's landmark protection ordinance not only against the total value of the restricted Grand Central Terminal Building, but also against the value of the*

Court. The Court stated, "We need only address the question whether a 'taking' has occurred." *Id.* at 122. The Court held there was not a taking because Penn Central continued to have economically viable use of its *regulated property* notwithstanding the air rights restriction.[13] On those facts, totally distinguishable from the Tulls' case, the Court in *Penn Central* held that the case presented only a situation of diminution of fair market value of the terminal site, the *regulated property* which was the "parcel as a whole".

In the Tulls' case, it must be assumed, because neither court provided any legal support for its decision, that the trial court and Supreme Court of Virginia misconstrued this Court's "parcel as a whole" statement in *Penn Central.* The statement that, " 'Taking' jurisprudence *does not divide a single parcel* into discrete segments and attempt to determine *whether rights in a particular segment have been entirely abrogated*" (*Id.* at 130) (emphasis added), was directed toward the single stick of Penn Central's bundle of property rights, *in the regulated property*, the air rights. The Court's statement does not support the inclusion of non-regulated property with regulated property to form the "parcel as a whole". The Court in *Penn Central* explicitly did not include other non-regulated properties owned by Penn Central into the "relevant calculus" to determine the "parcel as a whole".[14]

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owner's other properties in the vicinity." Rose, *Mahon* Reconstructed: Why the Takings Issue is Still a Muddle, 57 S.Cal. L.Rev. 561, 566-568 (1984). (emphasis added)

[13] Penn Central conceded that ". . . the parcel of land occupied by Grand Central Terminal must, in its present state, be regarded as capable of earning a reasonable return, and that the transferable development rights afforded Appellants by virtue of the Terminal's designation as a landmark are valuable, even if not as valuable as the rights to construct above the Terminal. In Appellants view none of these factors derogate from their claim that New York City's law has effected a 'taking'." *Id.* at 129.

[14] "*The Terminal is one of a number of properties owned by appellant Penn Central in this area of midtown Manhattan.* The

Unlike *Penn Central*, the denial of the fill permit to the Tulls denied them *all* economic viable use of seven platted mobile home lots and commercial parcel on two acres of their land. The Tulls were not denied the use of a discrete segment of these properties or only one stick of their bundle of rights. Unlike *Penn Central* no income producing improvements exist on the Tulls' regulated property and the Tulls are provided no valuable transferable development rights. Without the required fill permit *all* of the Tulls' *regulated property must remain in its natural state*, forever encumbered by the total prohibition of use that resulted from permit denial. A total "servitude" was imposed upon the Tulls' property by the permit denial. The Tulls are not denied the most beneficial use of the land with only a diminution in value as the Court found to exist as a result of the restriction of the development of the air rights in *Penn Central*. The *Penn Central* Court emphasized that it and similar cases of this Court were limited to facts presenting less than the total destruction of the value of the land subject to regulation.[15] The permit denial complained of by the Tulls is the total destruction of two acres of their land

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others include the Barclay, Biltmore, Commodore, Roosevelt, and Waldorf-Astoria Hotels, the Pan-American Building, and other office buildings along Park Avenue, and the Yale Club. At least eight of these are eligible to be recipients of developmental rights afforded the Terminal by virtue of landmark designation." *Id.* at 115 (emphasis added).

[15] "These cases dispose of any contention that might be based on Pennsylvania Coal Co. v. Mahon, 260 US 393, 67 L Ed 322, 43 S. Ct. 158, 28 ALR 1321 (1922), that full use of air rights is so bound up with the investment-backed expectations of appellants that governmental deprivation of these rights invariably—i.e., irrespective of the impact of the restriction on the value of the parcel as a whole—constitutes a "taking". Similarly, Welch, Goldblatt, and Gorieb illustrate the fallacy of appellants' related contention that a "taking" must be found to have occurred whenever the land-use restriction may be characterized as imposing a 'servitude' on the claimant's parcel." *Id.* at 130 n.27.

having a value of more than $150,000, a result which this Court holds in *Lucas* requires compensation.[16]

While the Tulls believe that they have suffered a compensable taking even under the majority holding in *Penn Central*, they have clearly suffered such a taking in the view of the dissent. The Tulls have over their objection been denied all right to use their *regulated property* and are required to preserve this property in its natural condition, in perpetuity, at their own expense. *See, Penn Central*, 438 U.S. at 140. The Tulls' property has been singled out for preservation without compensation, just as were the buildings of New York City singled out for landmark preservation. *See, Penn Central*, 438 U.S. at 140. The Tulls, because they own wetlands are compelled by the State to dedicate these wetlands, to the public benefit without just compensation and therefore share disproportionately with their neighbors the burdens of Virginia's wetland preservation policy. *See, Penn Central*, 438 U.S. at 140. The Tulls are required to preserve their private property for public benefit without just compensation disproportionately from other citizens of Virginia who filled their wetland property before enactment of the Virginia Wetland Statute. The Fifth and Fourteenth Amendments have not changed, only Virginia's policy to preserve wetlands at the expense of the private property owner has changed. As the dissent noted in *Penn Central*, it is not relevant that the denial of the permit destroyed property rights not yet used by the Tulls.[17]

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[16] *Lucas*, slip op. at 13. "We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."

[17] "It is, of course, irrelevant that appellees interfered with or destroyed property rights that Penn Central had not yet physically used. The Fifth Amendment must be applied with "reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reason-

The very evil predicted by the dissent in *Penn Central*, has been visited upon the Tulls. The Supreme Court of Virginia has sanctioned the denial of just compensation for the taking of all "economic viable use" of the Tulls' regulated property because the Tulls can use and develop their non-regulated property and thus receive what the trial court believed to be a reasonable return. In the view of the Supreme Court of Virginia the State may deny all economic viable use of any amount of regulated private property so long as the property owner can receive a "reasonable return" from non-regulated property. The potential for abuse in such a distorted view of the just compensation requirement of the Fifth Amendment is readily apparent. As the dissent correctly predicted in *Penn Central* the conceptual and legal problems presented by a rule in which a court must define "reasonable return" and "the particular property unit that should be examined" allows easy expansion of the "relevant calculus" to avoid an otherwise compensable taking.[18]

In *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979), decided after *Penn Central*, the Court did not include the adjacent development "of a marina style community of over 20,000 persons around the pond" into the "parcel as a whole" or as a factor in the "relevant calculus" to determine if the Corps of Engineers' requirement of a public right of access to the pond and the Hawaii Kai

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ably expected in the immediate future." *Id.* at 143 n.6 (citations omitted)

[18] "Difficult conceptual and legal problems are posed by a rule that a taking only occurs where the property owner is denied all reasonable return on his property. Not only must the Court define "reasonable return" for a variety of types of property (farmlands, residential properties, commercial and industrial areas), but the Court must define the particular property unit that should be examined. For example, in this case, if appellees are viewed as having restricted Penn Central's use of its "air rights", all return has been denied. See Pennsylvania Coal Co. v. Mahon, 260 US 393, 67 L Ed 322, 43 S Ct 158, 28 ALR 1321 (1922). The Court does little to resolve these questions in its opinion." *Id.* at 149 n.13.

Marina constituted a compensable taking. *Id.* at 167. The Court focused on the regulated property, the pond and marina. *Id.* at 168.

The same concerns that were expressed in the *Penn Central* dissent were again expressed by the dissent in *Keystone Coal Association* v. *DeBenedictis*, 480 U.S. 470, (1987) ("Keystone Coal"). As the dissent pointed out, "Similarly, there is no need for further analysis where the government by regulation extinguishes the whole bundle of rights in the identifiable segment of property, for the effect of this action on the holder is indistinguishable from the effect of a physical taking." *Id.* at 517. Nevertheless even in *Keystone Coal*, the inquiry was again limited to the regulated property, the 27 million tons of *regulated coal* that was required by, DER's 50% rule, to remain in place. *Id.* at 498-499. The majority in *Keystone Coal* Court did not incorporate into the "relevant calculus" non-regulated property to determine if a compensable taking resulted. The majority specifically stated in *Keystone Coal* that the "relevant calculus" does not go beyond the *regulated property.*[19] As predicted by the dissent in *Penn Central* and *Keystone Coal*, confusion in the lower courts was inevitable.

The Fourth Circuit Court of Appeals does not agree with the Supreme Court of Virginia's view that non-regulated property is part of the "relevant calculus". In *Naegele Outdoor Advertising, Inc.* v. *City of Durham*, 844 F.2d 172 (4th Cir. 1988), the Fourth Circuit carefully analyzed this Court's decisions in *Penn Central* and *Keystone Coal* and remanded for an evidentiary hearing on the taking issue to determine the ". . . appropriate unit of Naegele's property. . ." *Id.* at 176. The Fourth

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[19] "We do not suggest that the State may physically, appropriate relatively small amounts of private property for its own use without paying just compensation. The question here is whether there has been any taking at all when no coal has been physically appropriated, *and the regulatory program places a burden on the use of only a small fraction of the property that is subjected to regulation.* *Id.* at 499 n.27 (emphasis added).

Circuit's instructions to the district court were to formulate the takings analysis based solely upon the regulated property.[20]

The Ninth Circuit Court of Appeals distinguishes *Penn Central* and similar cases because "the entire subject property was covered by a uniform restriction" and holds that it is important to determine if the regulations will be applied uniformly to two separate parcels of property. If not, the parcels should be treated as two separate parcels rather than combined into a single "parcel as a whole". *American Sav. & Loan Assn* v. *County of Marin*, 653 F.2d 364, 369-370 (9th Cir. 1981) However, the United States District Court for the Northern District of California believes that because of this Court's holding in *Keystone Coal*, "it is doubtful that *American Savings* is still good law" because this Court "essentially rejected the *American Savings* court's notion that segments of property may be analyzed separately if a 'non-uniform regulation' affects various segments differently". *Zilber* v. *Town of Moraga*, 692 F.Supp. 1195, 1204 (N.D. Calif. 1988).

In *MacLeod* v. *Santa Clara County*, 749 F.2d 541, 548-549 (9th Cir. 1984), *cert. denied*, 472 U.S. 1009 (1985), the court found no taking from the denial of a permit to timber a portion of the property, sought by the owner because he could not carry the expenses of the property with ranching which was permitted. The court used *Penn Central* to support its position that the owner

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[20] ". . . on remand the district court can proceed directly to the taking claim determining first if it is premature. If mature, the legitimacy of the taking depends on whether the ordinance denies Naegele "economic viable use" of *an appropriate unit of its property. See, Keystone*, 107 S.Ct. at 1248-49. *The appropriate unit is that one which is substantially affected by the ordinance.* Its identification depends largely upon the scope of Naegele's sharing contracts. *Id.* at 178. (emphasis added) *See, also; Georgia Outdoor Advertising* v. *City of Waynesville*, 900 F.2d 783, 789 (4th Cir. 1990).

could continue "its original intended uses" without regard for the factual distinction that Penn Central was able to continue to use its property with a positive financial return.

The Federal District Courts also have a different opinion from the Supreme Court of Virginia as to what property should be included in the "relevant calculus". In *Corn* v. *City of Lauderdale Lakes*, 771 F.Supp. 1557, 1572 (S.D. Fla. 1991), the district court refused to permit a property owner to combine a shopping center site and mini warehouse site on a 261 acre parcel because, "The *Penn Central* Court, however, was discussing laws limiting subsurface excavation and development of air rights, *not adjacent, distinct portions of a 261-acre parcel.*" (emphasis added). In *Kaiser Dev. Co.* v. *County of Honolulu*, 649 F.Supp. 926, 947-948 (D. Hawaii, 1986), the district court rejected an argument that the land owner "has already received enough money from the development" and refused to include other property owned and developed into the "parcel as a whole".

Confusion, and inconsistent application of the "parcel as a whole" doctrine to include or not include non-regulated property in the "relevant calculus" since *Penn Central*, has also resulted in the state courts. Some state court decisions are directly at odds with the Supreme Court of Virginia. In *Burrows* v. *City of Keene*, 432 A.2d 15 (N.H. 1981), the Supreme Court of New Hampshire after careful analysis of the leading takings cases including *Penn Central* held that a compensable taking resulted when the City placed 109 acres of the plaintiffs 124 acres into a "conservation zone". In *Allingham* v. *City of Seattle*, 749 P.2d 160, 163-164 (Wash. 1988), later overruled in *Presbytery of Seattle* v. *King County*, 787 P.2d 907 (Wash. 1990) because of *Penn Central* and *Keystone Coal*, the Supreme Court of Washington, sitting *en banc* held a Greenbelt Ordinance which required 50%

to 70% of certain lots to be preserved in or returned to their natural state to be invalid as "an unconstitutional taking of private property without compensation" notwithstanding the City's argument that "the remaining 30% may be put to profitable use". In *Western Energy Co.* v. *Genie Land Co.*, 737 P.2d 478 (Mont. 1987), the Supreme Court of Montana considered the Court's "parcel as a whole" statement in *Penn Central* and acknowledged that, "The critical question then became how to define a segment of property for takings purposes." *Id.* at 483. The Supreme Court of Montana limited its inquiry to the regulated mineral rights ". . . at issue in this case, is destruction of Western's entire bundle of rights in the minerals beneath the surface owned by Genie." *Id.* at 483. The Supreme Court of Montana rejected the suggestion that the takings analysis should extend beyond the land which was the subject of the statute or that the mineral rights were only one stick in the bundle of rights.[21]

In *Aptos Seascape Corp.* v. *County of Santa Cruz*, 188 Cal. Rptr. 191 (App. 1982), the court refused to include all of Seascape's property into the "parcel as a whole". The 110 acres subject to regulation was only a part of the original 500 acres purchased and Seascape still owns approximately 200 acres of uplands and has developed and sold about 190 acres. *Id.* at 193. The court noted that *Penn Central* was factually distinguishable because it "did not involve contiguous property for which different zoning designations were adopted". *Id.* at 198. The

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[21] "Under Montana law, however, Western's entire bundle of rights consists of its rights to all the minerals beneath certain sections of land. These rights are not defined in terms of its various holdings in eastern Montana, but rather in terms of its rights to mine coal in the specific sections in question. Consequently, the Court's determination in *Keystone*, that merely one strand of Petitioner's rights had been taken is inapplicable here." *Id.* at 483.

court acknowledged the confusion that exists in the decisional law under the Fifth Amendment.[22]

In *Seawall Associates* v. *City of New York*, 542 N.E.2d 1059 (N.Y. 1989), the Court of Appeals of New York also distinguished *Penn Central* and *Keystone Coal* in striking down a municipal law establishing a five year moratorium on conversion, alteration and demolition of single-room occupancy housing and requiring the owners to restore all units to habitable condition and lease them at controlled rents for an indefinite time as a requirement that the owners dedicate their property to a public purpose.[23]

In *de St. Aubin* v. *Flacke*, 492 N.Y.S. 2d 766 (A.D. Dept 1985), the court held that a taking resulted from denial of permits to fill a tract of land divided into four

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[22] "Decisional law under the takings clause of the federal Constitution has been described as "hopelessly confused", with lower courts differing widely in their analytical frameworks for resolving takings challenges. (Note, Developments-Zoning (1978) 91 Harv. L.Rev. 1427, 1464.) That confusion is particularly apparent in cases with facts similar to those at issue, where a property owner alleges that governmental action restricting the use of a portion of his property constitutes a taking. Some courts consider the only question to be the effect of the regulations on the whole of the owner's contiguous property. (See, e.g., *Am. Dredging* v. *State, Dept. of Environ. Pro.* (1979) 169 N.J.Super. 18, 404 A.2d 42; *Multnomah County* v. *Howell* (1972) 9 Or.App. 374, 496 P.2d 235, 238.) Other courts focus on the restricted acreage, but also consider whether developmental rights have been denied outright, or transferred elsewhere. (See, e.g., *American Sav. & Loan Ass'n* v. *County of Marin* (1981) 653 F.2d 364; *Fifth Avenue Corp.* v. *Washington County*, etc. (1978) 282 Or. 591, 581 P.2d 50.)" *Id.* at 197.

[23] "Finally, defendants' efforts to uphold Local Law No. 9 miss a key feature of the law here and the one that distinguishes it from the Landmarks Law in *Penn Central*, the Subsidence Act in *Keystone*, and the Eagle Protection Act in *Andrus*. Unlike the regulatory actions in those cases, which simply limited the owners' conduct, Local Law No. 9 not only prohibits conduct but affirmatively requires that the owners dedicate their properties to a public purpose." *Id.* at 1070.

parcels which contained 22.2 acres of uplands and that the purchase of property with knowledge of restrictions such as zoning and wetland laws does not preclude a challenge to their validity. In *Spears* v. *Berle*, 397 N.E.2d 1304 (1979), the Court of Appeals of New York remanded for a hearing on the takings issue when the owner's two parcels of land contained regulated and non-regulated property. In that case a 51 acre parcel with 38 acres of wetlands and a 43 acre parcel with 8 acres of wetlands. In *Lewis* v. *New Castle County Bd. of Adj.*, 601 A.2d 1048 (1989), the Superior Court of Delaware refused to treat two parcels which were "split zoned" as a single parcel to deny the petitioners right to a variance.

In some states, the Court's *Penn Central* and *Keystone Coal* decisions are used as support for denial of just compensation and in the Supreme Court of Washington they were relied upon to support a complete reversal of the court's prior position. In *Presbytery of Seattle* v. *King County*, 787 P.2d 907, 914-915 (Wash. 1990), the Supreme Court of Washington, sitting *en banc* held that no taking resulted when a portion of the 4.5 acres of property contained wetlands which could not be used. The court relied upon the decisions in *Penn Central* and *Keystone Coal* to overrule its prior decision in *Allingham* v. *Seattle*, 109 Wash. 2d 947, 749 P.2d 160 (1988). The court does not discuss the fact that only part, not all of the property, was regulated property.[24]

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[24] "With the exception of this court's recent decision in *Allingham* v. *Seattle*, 109 Wash.2d 947, 749 P.2d 160 (1988), neither state nor federal law has divided property into smaller segments of *an undivided parcel of regulated property* to inquire whether a piece of it has been taken or whether a due process violation has occurred *with regard to a piece of regulated property*. Rather, *we have consistently viewed a parcel of regulated property in its entirety*. Federal case law has also specifically refused to focus its inquiry upon a given portion of a regulated property." *Id.* at 914-915. (emphasis added)

In *Am. Dredging* v. *State, Dept. of Environ. Pro.*, 404 A.2d 42 (1979), the court relying on *Penn Central* refused to void an order denying use of an 80 acre section of property because it "comprises only 3% of plaintiffs entire tract" of 2,500 acres. In *Carter* v. *South Carolina Coastal Council*, 314 S.E.2d 327 (S.C. 1984), the court held that denial of a permit to fill 5.3 acres of marshland was not a taking because "[a]n owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others". *Id.* at 329. In *Moshow* v. *Com'r of Dept. of Env. Management*, 427 N.E.2d 750 (Mass. 1981), the court relying upon *Penn Central* reversed a finding by the lower court that a taking resulted when 55% of the property was a wetland which could not be used. Eleven years before that court in *MacGibbon* v. *Board of Appeals of Duxbury*, 255 N.E.2d 347 (Mass. 1970) held that "The preservation of privately owned land in its natural, unspoiled state for the enjoyment and benefit of the public by preventing the owner from using it for any practical purpose" was not authorized. In *Claridge* v. *New Hampshire Wetlands Bd.*, 485 A.2d 287 (N.H. 1984), the court in reliance on *Penn Central* held there was no compensable taking for denial of a fill permit necessary to use the property for a residence because, "a person who purchases land with notice of statutory impediments to the right to develop that land can justify few, if any, legitimate investment-backed expectations of development rights which rise to the level of constitutionally protected property rights. *Id.* at 291.

Other state decisions hold that "separate parcels" should be combined to form the "parcel as a whole". In *Bevan* v. *Brandon TP*, 475 N.W.2d 37, 42-43 (Mich. 1991), two separate but contiguous lots, each with its own tax description and purchased at different times were held to be the "parcel as a whole" in reliance upon *Penn Central*. In *Gannett* v. *Lowell*, 450 N.E. 2d 1121,

1122 (Mass. App. 1983), the court combined two contiguous parcels in different towns into the "parcel as a whole". Because the remaining lands uses had value, the court denied compensation. In *Grand Forks-Trail Water Users* v. *Hjelle*, 413 N.W.2d 344, 347 (N.D. 1987), the court relied upon *Penn Central* to hold no taking occurred under a statute that prohibited construction of utility lines on private property within 100′ of the center line of a state highway. In *Jones* v. *Zoning Hearing Bd.*, 578 A.2d 1369 (Pa. Comwlth. 1990), the court relied upon *Penn Central* to uphold the validity of a zoning ordinance that limited density to provide open space.

Nowhere is the "parcel as a whole" and "relevant calculus confusion more apparent than in the Court of Claims. Citing to this Court's "parcel as a whole" reference in *Penn Central* the claims court in *Deltona Corporation* v. *United States*, 657 F.2d 1184 (1981) cert. denied, 455 U.S. 1017 (1982) ("Deltona") denied compensation to the property owner, sought after denial of a permit by the Corps of Engineers. Noting that the permits had been granted for two prior phases of the project and one of the three applied for, and that the two phases for which the permit was denied contained 111 acres of non-regulated upland property which had a substantial value the court denied compensation. The court held that ". . . this case merely presents an instance of some diminution in value." *Id.* at 1192. At the same time, in *Jentgen* v. *United States*, 657 F.2d 1210 (1981), cert. denied 455 U.S. 1017 (1982) ("Jentgen") the claims court denied compensation to the property owner, sought after denial of a permit by the Corps of Engineers based upon the "parcel as a whole" reference in *Penn Central*. *Id.* at 1213. While the permit denial in *Jentgen* would have allowed use of 20 of 80 acres subject to the permit requirement and 20 additional acres did not require a permit, compensation was denied because, the market value of the property, ". . . post denial is still between $80,000 and $150,000: the latter figure being the amount plaintiffs paid for the property in 1971." *Id.* at 1213. The

denial of just compensation in *Deltona* and *Jentgen* was predicated upon the fact that *both regulated wetlands and non-regulated uplands were combined in the permit applications* which were denied. *See, infra* at n.25. That is not the situation in the Tulls' case. The Tulls permit application was limited to the two acres of regulated wetland property and did not include the 10 acres of upland property not subject to the Wetland Board's jurisdiction.

In 1985 Chief Judge Kozinski in *Florida Rock Industries, Inc.* v. *United States*, 8 Cl.Ct. 160 (1985) held that a compensable taking resulted from the refusal of the Corps of Engineers to grant a permit needed to mine 98 acres of Florida Rock's property even though Florida Rock owned an additional 1,462 acres of property for which no permit had yet been requested or denied. The Federal Circuit reversed on other grounds, but refused to include in the "parcel as a whole" the 1,462 acres of property not yet subject to regulation or permit denial.[25]

More to the point in *Loveladies Harbor, Inc.* v. *United States*, 15 Cl.Ct. 381, 391-393 (1988) *appeal pending*, No. 91-5050 (Fed.Cir., February 13, 1991) ("Loveladies Harbor") Chief Judge Smith carefully analyzed this Court's decision in *Penn Central* and determined that the "parcel as a whole" did not include the 250 acres of the original purchase, only 57.4 acres of which was still owned by the plaintiff. *Id.* at 392. Next Judge Smith eliminated from the 57.4 acres, 38.5 acres from the "parcel as a whole" because the State of New Jersey had already denied the permits necessary to fill this portion of

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[25] "Defendant says there was no taking because the 98 acres held taken are only a small part of a single tract of 1,560 acres, the rest not taken, and no restriction arising from the denial of the permit applies to them. Such a contention had dignity and was of decisive importance in the cases of *Deltona, supra* and *Jentgen, supra*, but there the Army engineers considered the entire tracts and determined that portions thereof could be developed as proposed. Here the Army engineers considered only the 98 acres." *United States* v. *Florida Rock Industries, Inc.*, 791 F.2d 893, 904-905, *cert. denied*, 479 U.S. 1053 (1987).

the property. Judge Smith next eliminated from the remaining 18.9 acres 6.4 acres which were ". . . not effected by the Army Corps of Engineers' permit denial . . ." and are no longer contiguous to the 12.5 acres at issue. *Id.* at 393. Finally, Judge Smith held that the, ". . . ultimate amount of property to be considered part of the parcel as a whole in this case is, accordingly, the 12.5 acres at issue," the property subject to regulation by the Corps of Engineers and for which the permit was denied. *Id.* at 384. However, even Judge Smith's careful analysis in *Loveladies Harbor* demonstrates uncertainty over whether or not to include non-regulated "adjacent properties" in the "relevant calculus" even though in *Penn Central* non-regulated adjacent properties were not included in the "parcel as a whole." *See, Id.* at 393.

Even after Judge Smith's carefully reasoned analysis of the "parcel as a whole" in *Loveladies Harbor* and the Federal Circuit's refusal to include the remaining 1,462 acres owned by Florida Rock Industries, but not subject to regulation, the claims court in *Ciampetti* v. *United States*, 22 Cl.Ct. 310 (1991) included non-regulated property in the "parcel as a whole". While recognizing that this Court in *Penn Central* and *Keystone Coal* did not include non-regulated land in the "relevant calculus", the court held that because *Ciampetti* treated both the regulated and non-regulated property as the "parcel as a whole" the court should also. The court conceded that "Admittedly in those cases [*Penn Central* and *Keystone Coal*] the Court was not directly dealing with a governmental contention that additional land ought to be included in the calculus." *Id.* at 318. In the Court of Claims the "parcel as a whole" continues to be a ship without a rudder.

The implications of the Supreme Court of Virginia's decision below are enormous. We have found that in the fourteen years before *Penn Central* the term "parcel as a whole" was used 16 times and not all of these cases related to "takings". In the fourteen years since *Penn*

Central the term "parcel as a whole" has been used 85 times. This represents more than a five fold increase in the number of decisions that have required a determination of the "relevant calculus" after this Court's pronouncement of the term "parcel as a whole" in *Penn Central*. This dramatic increase in the number of cases and the differing results demonstrate that defining the "relevant calculus" in takings cases will be a constantly recurring one and that the decision below will only add support to the argument that just compensation is not required when the state denies *all* economic viable use of private property so long as the owner can receive what the court determines to be a reasonable rate of return on the non-regulated property. That the issue is likely to recur is amply illustrated by the many different results reached in the state and federal cases since *Penn Central* which have been cited in this Petition.

The Virginia Supreme Court has now joined ranks with those courts who would allow the confusion created by the Court's *Penn Central* and *Keystone Coal* decisions to expand the "relevant calculus" to capture in the state's "regulatory web" all property, regulated or not, to deny just compensation which would otherwise clearly be required by this Court's decision in *Lucas*. The Fifth Amendment will continue to be construed to reach different results in different states. Had the Tulls' property been located in the State of New York they would have been compensated.[26]

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[26] "Since wetlands restrictions are far more stringent than zoning regulations—restricting development per se as opposed to restricting types of uses—the Legislature has provided the property owner with a remedy against an unconstitutional taking within the context of the regulatory scheme itself. Thus, if a permit is denied or the permit offered is more limited in scope than that sought, the owner may seek juidicial review of the administrative denial (ECL 25-0404). This review proceeding is unique in that a determination sustaining the permit denial, as supported by substantial evidence, will then trigger a second determination in the same proceeding as to whether this developmental restriction constitutes an unconstitu-

We know that we need not argue to this Court the importance of the Fifth Amendment's admonition that ". . . nor shall private property be taken for public use, without just compensation" because the Court itself has emphasized this consistently through the years in cases too numerous to cite. We only add here that the instant case represents a perversion of justice that this Court should not allow to stand. States, including Virginia, should not be permitted to avoid the requirement of the Fifth Amendment that just compensation be paid when the state regulates out of existence all right to reasonably use private property with the expediency of diluting that right by including non-regulated property into the "relevant calculus", under an erroneous claim that this Court has sanctioned such a result by its decisions in *Penn Central* and *Keystone Coal*.

CONCLUSION

For the reasons outlined above, certiorari should be granted and the judgment below reversed.

Respectfully submitted,

RICHARD R. NAGEOTTE *
JAMES SCOTT KREIN
NAGEOTTE & KREIN
385 Garrisonville Road, Suite 201
Stafford, Virginia 22554
(703) 659-5050
Attorneys for Petitioners

* Counsel of Record

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tional taking without compensation (ECL 25-0404). This second determination will be made on the basis of a full evidentiary hearing and, if a taking is found, the commissioner will be directed, at his option, to either grant the requested permit or institute condemnation proceedings (ECL 25-0404; cf. *Spears* v. *Berle, supra*, p. 261, 422 N.Y.S.2d 636, 397 N.E.2d 1304)." *Chase Manhattan Bank, N.A.* v. *State of New York*, 479 N.Y.S.2d 983, 986-987 (A.D. 2 Dept. 1984).

APPENDICES

APPENDIX A

VIRGINIA:

[Mar. 05, 1992]

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 3rd day of March, 1992.

Record No. 911891
Circuit Court No. 88CH128

EDWARD L. TULL, *et al.*,
Appellants,

against

COMMONWEALTH OF VIRGINIA, *et al.*,
Appellees.

From the Circuit Court of Accomack County

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

DAVID B. BEACH
Clerk

By: /s/ [Illegible]
Deputy Clerk

APPENDIX B

VIRGINIA:

IN THE CIRCUIT COURT
OF ACCOMACK COUNTY

In Chancery No. 88-CH-128

EDWARD L. TULL and LOUISE A. TULL,
Complainants,

v.

COMMONWEALTH OF VIRGINIA and
COUNTY OF ACCOMACK,
Defendants.

FINAL DECREE

This case was tried before the Court on June 27 and 28, 1991. The Complainants were represented by their counsel, Richard R. Nageotte. Defendant Commonwealth of Virginia was represented by Pamela M. Reed and Frederick S. Fisher, Assistant Attorneys General, and Defendant Accomack County Board of Supervisors was represented by Bruce D. Jones, Jr., Accomack County Attorney. Evidence was presented and the case was argued.

Upon consideration of all the evidence, arguments of counsel, the memoranda previously filed and for the reasons stated from the bench, the Court finds that the Wetlands Act passed in 1972 advances a legitimate state interest and that denial of the Tulls' permit application by the Accomack County Wetlands Board which was affirmed by the Virginia Marine Resources Commission to fill approximately 2 acres of wetlands in Ocean Breeze Mobile

Home Sites Subdivision, Section "D" did not deprive the Tulls of all economically viable use of their property, and that therefore there has been no taking by inverse condemnation of the Tulls' property. It is therefore

ORDERED, ADJUDGED AND DECREED that this Court finds in favor of the Commonwealth of Virginia and the County of Accomack and grants final judgment to the Commonwealth of Virginia and the County of Accomack and this case should be and therefore is dismissed. And it is

FURTHER ORDERED, ADJUDGED AND DECREED that the Complainants having expressed their intention to appeal this Final Decree to the Virginia Supreme Court and having requested this Court to fix the bond on appeal, the Court does in accordance with Code of Virginia 1950 as amended, § 8.01-676.1, fix the bond for costs on appeal in the amount of $500.00 in the form of an irrevocable letter of credit from the Farmers and Merchants Bank, Chincoteague, Virginia. And it is

FURTHER ORDERED, ADJUDGED AND DECREED that this Decree being final, the Clerk shall place this file with the ended cases.

Enter this 4th day of November, 1991.

/s/ N. Wescott Jacob
N. WESCOTT JACOB
Judge
Circuit Court of Accomack County

[342]

VIRGINIA:

IN THE CIRCUIT COURT
OF ACCOMACK COUNTY

In Chancery No. 88-CH-128

EDWARD L. TULL and LOUISE A. TULL,
Complainants,

v.

COMMONWEALTH OF VIRGINIA and
COUNTY OF ACCOMACK,
Defendants.

TRANSCRIPT OF PROCEEDINGS

June 28, 1991

RULING OF THE COURT

THE COURT: Well, of course, there can be no question that the General Assembly passed this wetlands legislation in 1972 and it was passed to advance a legitimate state interest. There is no question that in this case the Accomack County Wetlands Board denied Mr. Tull's application for a permit.

The question is did their depriving Mr. Tull of this permit deprive the landowner of all economic viable use of the property, and I think that's the whole question if [sic] the case. As I say, to determine that, I think you've got to decide what is the property in question, or the parcel as a whole as you [sic] Supreme Court phrased it and you phrased it here.

To me, it is just absolutely [343] ridiculous to say that the two acres of wetlands as shown on a plat and the County used that plat in assessing the property and the

assessed each lot individually, so each lot becomes a parcel as a whole. That to me is absolutely ridiculous.

The County and Commonwealth argue that the parcel as a whole IS the 43 acres that Mr. Tull purchased. Mr. Nageotte argues, and I think there is certainly some merit to that argument. There's been no evidence here to show what wetlands there were on this 43 acres, but I think it is certainly reasonable to use the Ocean Breeze Section D, the approximately 12 acres that was platted as the parcel as a whole, and certainly Mr. Tull's sold for a very considerable price. I think one was $16,000 and one was two at $20,000 after the permit was denied—lots from this parcel. It certainly cannot be argued that he was denied all economic viable use of the property.

I never have thought probably made too much difference whether he made a profit or a loss on this entire property, but I again think it is rather ridiculous to use all of the litigation [344] expenses that were involved by Mr. Tull in the federal district court as expenses on this property for the purpose of showing whether it was a profit or loss. If you don't use those figure, of course, there is no question Mr. Tull made a substantial recovery from his investment, a substantial profit from the sale of the lots in Ocean Breeze Section D.

I do not find that there has been any loss of economic viable use of the property because the permit was denied as to two acres. For that reason I do not think there has been a taking.

I would ask Mr. Jones and the Attorney General to prepare a decree in accordance with that ruling and have Mr. Nageotte endorse same and present it to me for signature.

MR. JONES: All right, Your Honor.

MS. REED: Thank you, Your Honor.

(Trial concluded at 12:48 p.m.)

APPENDIX C

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond, on Friday the 17th day of April, 1992.

Record No. 911891
Circuit Court No. 88CH128

EDWARD L. TULL, *et al.*,
Appellants,

against

COMMONWEALTH OF VIRGINIA, *et al.*,
Appellees.

Upon a Petition for Rehearing

On consideration of the petition of the appellants to set aside the judgment rendered herein on the 3rd day of March, 1992 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

/s/ [Illegible]
Clerk

VIRGINIA:

IN THE SUPREME COURT OF RICHMOND
CITY OF RICHMOND

Record No. 911891
Circuit Court No. 88CH128

EDWARD L. TULL, *et al.*,
Appellants

v.

COMMONWEALTH OF VIRGINIA, *et al.*,
Appellees

PETITION FOR REHEARING

COME NOW your Appellants, Edward L. Tull and Louise A. Tull, by Counsel, pursuant to Rule 5:20 of the Rules of the Supreme Court of Virginia and Petition this Court for Rehearing upon the following grounds:

1. This Court entered its Order on March 3, 1992 refusing Appellants' Petition for Appeal. This Petition for Rehearing is timely filed and served as required by Rule 5:20.

2. Appellants' Bill of Complaint filed in the Circuit Court of Accomack County appealed the refusal of the Commonwealth of Virginia and Accomack County to pay just compensation for seven mobile home lots and a commercial parcel the Tull's asserted was taken by the Commonwealth of Virginia and Accomack County as a result of refusal to grant a permit to fill wetlands. Denial of the necessary permit left Appellants with seven mobile home lots and a commercial parcel of land, which the Commonwealth of Virginia and Accomack County

conceded had no use and must remain as vacant lots because of the denial of the permit to fill wetlands. Appellants' *state constitutional claims* pursuant to Article I, Section 11 of the Virginia Constitution were contained in Count I of the Bill of Complaint and Appellants' *federal constitutional claims* pursuant to the Fifth Amendment of the Constitution of the United States applicable to the states through the Fourteenth Amendment were contained in Count II of the Bill of Complaint.

3. The Circuit Court of Accomack County denied Appellants' claims for compensation under both Article I, Section 11 of the Virginia Constitution (Count I of the Bill of Complaint) and the Fifth Amendment of the Constitution of the United States applicable to the states through the Fourteenth Amendment of the Constitution of the United States (Count II of the Bill of Complaint) upon the grounds that the relevant "parcel as a whole" for purposes of the takings analysis was the entire twelve acres subdivided into Ocean Breeze Mobile Home Sites, Section "D" and not the seven mobile home lots and commercial parcel located in the wetlands portion of the subdivision for which the permit was denied, which is conceded to be the only property subject to the requirement of a county or state wetlands permit.

4. On pages 23-27 of the Appellants' Petition for Appeal, Appellants set out in detail the United States Claims Court's analysis of the "parcel as a whole" in *Loveladies Harbor, Inc.* v. *United States*, 21 Cl.Ct. 153 (1990) which held that the parcel as a whole was the area which was subject to the jurisdiction of the permitting authority and the requirement of a permit, in that case the U.S. Army Corps of Engineers. The Circuit Court of Accomack County has reached a different result in the instant case.

5. As pointed out in footnote 4, page 23 of Appellants' Petition for Appeal, *Loveladies Harbor, Inc.* v. *United States*, 21 Cl.Ct. 153 (1990) is on appeal to the United

States Court of Appeals for the Federal Circuit No. 91-5050 (Fed.Cir., February 13, 1991).

6. Counsel for Appellants has learned that oral argument has been completed in *Loveladies Harbor, Inc.* v. *United States*, Federal Circuit No. 91-5050 (Fed.Cir. February 13, 1991) and accordingly a decision by the Federal Circuit is imminent.

7. While the decision of the Federal Circuit in *Loveladies Harbor, Inc.* v. *United States*, Federal Circuit No. 91-5050 (Fed.Cir. February 13, 1991) may or may not, in this Court's view, be relevant to this Court's determination of the Appellants *state constitutional claims* contained in Count I of the Bill of Complaint, the decision is *highly relevant* to the Appellants *federal constitutional claims* contained in Count II of the Bill of Complaint which are both on appeal in this case. This Court held in its Order entered on Tuesday the third day of March, 1992, ". . . no reversible error in the judgment complained of. Accordingly, the Court refuses the Petition for Appeal." As a result this Court has found no reversible error and refused the Appellants' Petition for Appeal on *both* the *state constitutional claims* and the *federal constitutional claims*.

8. The United States Claims Court is the trial court with jurisdiction over all suits alleging a taking of property without just compensation in violation of the Fifth Amendment by the United States when the amount in controversy exceeds $10,000, pursuant to jurisdiction under the Tucker Act. The Federal Circuit is the Appellate Court that reviews decisions of the United States Claims Court. Accordingly, the decision of the Federal Circuit in *Loveladies Harbor, Inc.* v. *United States*, United States Court of Appeals for the Federal Circuit, No. 91-5050 (Fed.Cir. February 13, 1991) relating to the specific issue raised by the Petition for Appeal in the instant case, i.e., whether the "parcel as a whole" for purposes of the takings analysis should be limited to the area

which is subject to the permit requirement or some larger parcel is directly relevant to the Appellants' *federal constitutional claim* and could result in this Court finding reversible error in the instant case, at least with respect to Appellants' *federal constitutional claim.*

9. Appellants respectfully submit that this Court should grant their Petition for Rehearing and stay further proceedings in this case, at least with respect to the *federal constitutional claims* raised on appeal until the Federal Circuit has published its decision in *Loveladies Harbor, Inc.* v. *United States*, U.S. Court of Appeals for the Federal Circuit No. 91-5050 (Fed.Cir. February 13, 1991).

WHEREFORE, pursuant to Rule 5:20 of the Rules of the Supreme Court of Virginia, Appellants, by Counsel, Petition for Rehearing and a stay of any further decision in this case until the Federal Circuit issues its decision in *Loveladies Harbor, Inc.* v. *United States*, U.S. Court of Appeals for the Federal Circuit No. 91-5050 (Fed.Cir. February 13, 1991) and that decision is reviewed by this Court.

EDWARD L. TULL and
LOUISE A. TULL

/s/ Richard R. Nageotte
By Counsel

/s/ Richard R. Nageotte
RICHARD R. NAGEOTTE
NAGEOTTE & KREIN
385 Garrisonville Road, Suite 201
Stafford, VA 22554
(703) 659-5050
Counsel for Appellants,
Edward L. Tull and Louise A. Tull

CERTIFICATE OF SERVICE

I hereby certify that I have this 9th day of March, 1992, filed eight copies of this Petition for Rehearing with the Clerk of the Supreme Court of Virginia and have served a true copy of this Petition for Rehearing by hand-delivery on the 9th day of March, 1992 to Frederick S. Fisher, Esquire and Pamela M. Reed, Esquire, Office of the Attorney General, Commonwealth of Virginia, 101 N. Eighth Street, Richmond, VA 23219, Counsel for Commonwealth of Virginia and have on this 9th day of March, 1992, mailed, postage pre-paid by first class mail, a true copy of this Petition for Rehearing to Bruce D. Jones, Jr., Esquire, Accomack County Attorney, One Front Street, Accomac, VA 23301, Counsel for Accomack County Board of Supervisors.

/s/ Richard R. Nageotte
RICHARD R. NAGEOTTE
Counsel for Appellants

APPENDIX D

VIRGINIA:

IN THE CIRCUIT COURT OF ACCOMACK COUNTY

Chancery No. 88-CH-128

EDWARD LUNN TULL and LOUISE A. TULL,
Complainants

v.

COMMONWEALTH OF VIRGINIA

and

BOARD OF COUNTY SUPERVISORS
ACCOMACK COUNTY, VIRGINIA
P.O. Box 388
Route 764
Accomac, Virginia 23301

and

EDWARD J. MAZUR
COMPTROLLER, COMMONWEALTH OF VIRGINIA
Department of Accounts
James Monroe Building, 2nd Floor
101 N. 14th Street
Richmond Virginia 23219

and

MARINE RESOURCES COMMISSION OF
THE COMMONWEALTH OF VIRGINIA

and

ACCOMACK COUNTY WETLANDS BOARD,
Defendants

BILL OF COMPLAINT

TO THE HONORABLE N. WESCOTT JACOB, JUDGE OF THIS COURT:

Your Complainants respectfully allege as follows:

COUNT ONE

1. This Count One is a Declaratory Judgment action pursuant to Section 8.01-184 and Section 8.01-187 Code of Virginia, to determine whether Complainants' real property within Accomack County, Virginia, has been taken without just compensation (inverse condemnation) in Violation of Article I, Section 11 of the Constitution of the Commonwealth of Virginia and to appoint Commissioners to establish the value of the taking pursuant to Section 8.01-187 of the Code of Virginia.

2. In prosecuting their claim of taking against the Board of County Supervisors, County of Accomack, Virginia, your Complainants have exhausted all administrative remedies available to them pursuant to Section 15.1-550, Code of Virginia as evidenced by the denial of claim issued by the County of Accomack, Virginia, on July 21, 1988, which denial of claim together with the Petition of Claim is marked as Exhibit "A" attached hereto and incorporated herein and which denial is appealed by this Bill of Complaint. Your Complainants have caused a written notice of appeal to be served on the Clerk of the Board of Accomack County and have posted a bond pursuant to Section 15.1-552, Code of Virginia.

3. The Board of County Supervisors, Accomack County, Virginia is named as Defendant in this action pursuant to Section 15.1-552, Code of Virginia.

4. In prosecuting their claim of taking against the Marine Resources Commission of the Commonwealth of Virginia, your Complainants have exhausted all administrative remedies available to them pursuant to Section

2.1-223.1, Code of Virginia, as evidenced by the denial of claim issued by the Marine Resources Commission on June 24, 1988, which denial of claim together with the Petition of Claim is marked as Exhibit "B" attached hereto and incorporated herein and which denial is appealed by this Bill of Complaint.

5. The Marine Resources Commission of the Commonwealth of Virginia is named as Defendant in this action pursuant to Section 8.01-192, Code of Virginia.

6. The Commonwealth of Virginia is a named Defendant in this action pursuant to Section 8.01-192, Code of Virginia.

7. Edward J. Mazur, Comptroller of the Commonwealth of Virginia is named as Defendant in this action pursuant to Section 8.01-193, Code of Virginia.

8. The Defendants named in this action are sued jointly and severally to pay compensation to your Complainants which resulted from the taking of Complainants' real property without compensation as alleged herein and attorneys' fees and costs.

9. Your Complainants Edward Lunn Tull and Louise A. Tull are the owners of Ocean Breeze Mobile Home Sites Subdivision, Section "D", located within Accomack County upon the Island of Chincoteague, Virginia.

10. By reason of the recordation of the Subdivision Plat for Ocean Breeze Mobile Home Sites, Section "D", a copy of which Plat is marked as Exhibit "C" attached hereto and incorporated herein, each mobile home lot shown on the Subdivision Plat is an individual and distinct parcel of real property, as is the parcel of property shown as Future Commercial Development.

11. In reliance upon the vested rights granted by the laws of the Commonwealth of Virginia and the Ordinances of Accomack County, Complainants are entitled to develop

each and every individual mobile home lot and the area shown as Future Commercial Development shown on the Subdivision Plat of Ocean Breeze Mobile Home Sites, Section "D".

12. Pursuant to the statutes of the Commonwealth of Virginia and the Ordinances of Accomack County, Virginia relating to the platting and subdivision of land, each of the individually platted mobile home lots located in Ocean Breeze Mobile Home Sites Subdivision, Section "D", can be used only for the placement of mobile homes and for no other purposes. Complainants have been in the process of completion of development and sale of the individually platted mobile home lots and the Future Commercial Area in accordance with their vested rights as aforesaid.

13. In reliance upon the rights granted to them by the Statutes of the Commonwealth of Virginia and the Ordinances of Accomack County, Virginia, relating to the platting and subdivision of land and the approval and platting of the Subdivision Plat for Ocean Breeze Mobile Home Sites Subdivision, Section "D", your Complainants expended approximately $11,400.00 for engineering and survey work, $5,700.00 for excavating and grading of roads, $102,600.00 for installation of central sewage drainfields, pumps, and lines, $47,250.00 for installation of water service and $40,937.00 for the installation of electrical service to Ocean Breeze Mobile Home Sites Subdivision, Section "D", for the purpose of serving all of the lots located therein. These expenditures by your Complainants result by operation of law in a vested right to Complainants' development of each and every lot designated on the plat of Ocean Breeze Mobile Home Sites Subdivision, Section "D", and the property designated as Future Commercial Development as shown on said plat.

14. The only outstanding requirement necessary to complete and sell certain lots located in Ocean Breeze Mobile Home Sites Subdivision, Section "D", and the

Future Commercial Area, is the filling of said lots and parcels and the grading of roads adjacent to the said lots.

15. The Accomack County Wetlands Board determined that the real property in question and subject to this claim of taking was located within 1.5 times the mean high tide and contained wetlands vegetation listed in the statute and thus asserted its jurisdiction over the property and required the Complainants to submit an application for a permit to fill the lots, roads and future commercial property more specifically identified in paragraph 23 of this Bill of Complaint.

16. In order to lawfully fill the lots and future commercial area in Ocean Breeze Mobile Home Sites Subdivision, Section "D", real property owned solely by the Complainants, which are located in areas subject to jurisdiction of the Accomack County Wetlands Board and the Virginia Marine Resources Commission, your Complainants filed a permit application with the Accomack County Wetlands Board as required by law and regulations. The purpose of the permit application was to fill the lots within the jurisdiction of the Accomack County Wetlands Board pursuant to the Wetlands Zoning Ordinance For Accomack County § 28.1 *et. seq.* and § 62.1-13.1 *et. seq.*, Code of Virginia, 1950 as amended.

17. Jurisdiction of the Accomack County Wetlands Board to require a permit for Complainants to fill their real property subject to this action is contained in the Wetlands Zoning Ordinance for Accomack County, § 4.

18. Jurisdiction of the Virginia Marine Resources Commission over the Accomack County Wetlands Board is contained in Code of Virginia, § 62.1-13.10, § 62.1-13.11, § 62.1-13.12 and § 62.1-13.13.

19. On September 10, 1987, the Accomack County Wetlands Board denied your Complainants' Application for a permit to fill the lots, adjacent roads and commercial

area upon the grounds that denial was necessary to preserve wetlands on the Island of Chincoteague, Virginia, as a valuable public resource notwithstanding that the land subject to the permit application was the private property of the Complainants. A copy of the denial is marked Exhibit "D" attached hereto and incorporated herein. The permit denial did not provide for compensation to your Complainants.

20. The Virginia Wetlands Statute, Section 62.1-13.1, Code of Virginia, and Accomack Wetlands Zoning Ordinance, Section 9 recognize wetlands as a valuable public resource even if located upon private property and encourage the preservation of these wetlands by denial of permits to fill them. (Accomack County Wetlands Zoning Ordinance, Section 9 and Sections 62.1-13.9, 62.1-13.3, 62.1-13.4, Code of Virginia).

21. Neither the Virginia Wetlands Statute nor the Accomack County Wetlands Zoning Ordinance provide for the payment of compensation when the private property of a permit applicant is taken for public purposes without compensation by the denial of a permit request.

22. The Commonwealth of Virginia and the Board of Supervisors of Accomack County have the power of eminent domain and may take private property for a public purpose but are required by the Constitution of the Commonwealth of Virginia to pay just compensation.

23. The Accomack County Wetlands Board, by denying Complainants a permit, has denied to your Complainants the right to fill and as a direct and proximate result, the right to use and sell the lots, roads, and future commercial development area highlighted in yellow on the plat of Ocean Breeze Mobile Home Sites Subdivision, Section "D", which is marked Exhibit "C". This permit denial, marked as Exhibit "D", denies to Complainants all reasonable viable economic use of Lots 39D, 46D, 47D, 51D, 52D, 53D and 54D of Ocean Breeze Mobile Home

Sites, Section "D", the adjacent roads and the entire Future Commercial Development area.

24. In accordance with the applicable provisions of law, your Complainants appealed the decision of the Accomack County Wetlands Board to the Virginia Marine Resources Commission.

25. On November 5, 1987, the Virginia Marine Resources Commission upheld and affirmed the decision of the Accomack County Wetlands Board denying the permit application of the Complainants. A copy of the action of the Virginia Marine Resources Commission is marked Exhibit "E", attached hereto and incorporated herein.

26. By reason of the actions taken, as set out in Paragraphs 23, 24, and 25 above, your Complainants have been denied a permit to fill the lots, roads, and future commercial area as herein described, and as a direct and proximate result of the denial of their permit application, cannot use, develop or sell the lots, roads, and future commercial area herein described.

27. Because your Complainants cannot fill and therefore cannot develop, use or sell the lots, roads and future commercial area hereinafter set out, they have lost all reasonable viable economic use of the lots, roads and future commercial development area herein described. By reason of the denial of a permit to fill said lots, roads and future commercial development area and by reason of the failure and refusal of the Accomack County Wetlands Board to grant the permit necessary and the subsequent affirmation of permit denial by the Virginia Marine Resources Commission, the lots, roads and future commercial areas herein described have been taken without compensation by Accomack County and the Commonwealth of Virginia for public purposes, i.e. preservation of the wetlands area for the use and benefit of the public in general. As a result, your Complainants have been

denied all reasonable economic viable use of the property, the property has no reasonable value to your Complainants, and your Complainants have been required by the permit denial to bear a disproportionate burden of the public benefits which result from the permit denial.

28. The action of the Accomack County Wetlands Board, which has been affirmed by the Virginia Marine Resources Commission, has resulted in a taking of private property for public use and benefit without just compensation, in violation of the Constitution of the Commonwealth of Virginia and constitutes an inverse condemnation of the private property of the Complainants for public use.

29. The Accomack County Wetlands Board acts both as an agency of and as the authorized agent of the Accomack County Board of Supervisors and the Commonwealth of Virginia for purposes of Wetlands Zoning Decisions. The Accomack County Board of Supervisors and Accomack County are jointly and severally responsible for any claims for taking of private property for the public's use and benefit without compensation which results from the Accomack County Wetlands Board's denial of permit applications to fill wetlands located within Accomack County, Virginia.

30. The Virginia Marine Resources Commission is an agency of the Commonwealth of Virginia and operates in a supervisory capacity over the Accomack County Wetlands Board pursuant to the provision of the Code of Virginia, 1950, as amended, § 28.1 *et. seq.* and § 62.1 *et. seq.* Accordingly, Accomack County, the Accomack County Board of Supervisors, Accomack County Wetlands Board, Virginia Marine Resources Commission and Commonwealth of Virginia are jointly and severally liable for all claims relating to the taking of private property for the public's use and benefit without compensation which result from failure or refusal to grant permits for filling of wetlands within Accomack County, Virginia.

31. Based upon recent comparable sales, the fair market value of each of the mobile home lots shown on Exhibit "C", for which a permit to fill was denied by the Accomack County Wetlands Board, was $17,000.00 per mobile home lot at the time the taking occurred.

32. Based upon recent comparable sales, the fair market value of the Future Commercial Development area shown on Exhibit "C", was $75,000.00 at the time the taking occurred.

33. Because a permit to fill the land shown on Exhibit "C" has been denied, the Complainants have lost all reasonable economic use and value of lots 39D, 46D, 47D, 51D, 52D, 53D, and 54D and the roads necessary to obtain access to these lots and the area shown as Future Commercial Development. The fair market value at the time of the taking for which compensation is claimed is $194,000.00, which is calculated as follows:

LOT NO.	FAIR MARKET VALUE
39D	$ 17,000.00
46D	$ 17,000.00
47D	$ 17,000.00
51D	$ 17,000.00
52D	$ 17,000.00
53D	$ 17,000.00
54D	$ 17,000.00
Future Commercial Area	$ 75,000.00
Total:	$194,000.00

34. For the reasons hereinabove set out, your Complainants make this claim against the Board of Supervisors of Accomack County, Virginia and the Accomack County Wetlands Board, and the Commonwealth of Virginia and the Marine Resources Commission of the Commonwealth of Virginia jointly and severally, in the total sum of $194,000.00 for the taking of their private property for public use and benefit without just compensation in violation of the Constitution of the Commonwealth of Virginia.

WHEREFORE, your Complainants pray that this Court grant the following relief:

a. Entry of a Decree which declares that the denial of your Complainants application for a permit to fill the lots, adjacent roads and future commercial development area as set out on Exhibit "C" and listed in paragraph 33, by the Accomack County Wetlands Board and the subsequent affirmation of permit denial by the Virginia Marine Resources Commission constitute a taking of Complainants' real property by both the County of Accomack, Virginia through the Accomack County Wetlands Board and by the Commonwealth of Virginia through the Virginia Marine Resources Commission.

b. Entry of a Decree which declares that such permit denial and taking of Complainants' real property by the County of Accomack, Virginia and the Commonwealth of Virginia was a taking without just compensation and that such permit denial and taking without compensation is in violation of Article I, Section 11 of the Constitution of the Commonwealth of Virginia.

c. For a Decree appointing Commissioners in accordance with § 8.01-187, Code of Virginia, to set the value of the take and enter Judgment in favor of your Complainants against the County of Accomack, Virginia and the Commonwealth of Virginia, jointly and severally, in the amount of $194,000.00 as just compensation for the taking of your Complainants' real property at the time of the taking together with interest at the judgment rate from the time of the taking until paid.

d. For a Decree awarding judgment for reasonable costs to your Complainants incurred in the prosecution of this action including attorney, appraisal, and engineering fees actually incurred pursuant to Section 25-251, Code of Virginia, 1950, as Amended.

e. For such other and further relief as may be necessary and appropriate.

COUNT TWO

35. This Count Two is an action pursuant to the Fifth Amendment to the Constitution of the United States made applicable to the Commonwealth of Virginia and its political subdivisions through the Fourteenth Amendment to the Constitution of the United States which prohibits the Commonwealth of Virginia, through the Virginia Marine Resources Commission and the County of Accomack, Virginia through the Accomack County Wetlands Board, from taking private property for public use without just compensation.

36. The allegations contained in paragraphs 1 through 34 as set out in Count One are hereby incorporated into this Count Two by reference as if the same were fully set out and realleged in this Count Two.

37. In reliance upon an approved Subdivision Plat, your Complainants committed substantial financial resources in developing their property for its intended purpose i.e., mobile home and commercial lots.

38. The denial of a permit by the Accomack County Wetlands Board to fill the lots, adjacent roads and commercial area as set out on Exhibit "C" and the subsequent affirmation of permit denial by the Virginia Marine Resources Commission renders your Complainants' property unusable for its intended purposes, i.e., mobile home and commercial lots pursuant to a previously approved Plat.

39. Because of the denial of the permit by the Accomack County Wetlands Board and the subsequent affirmation of permit denial by the Virginia Marine Resources Commission, your Complainants' property has no reasonable viable economic worth and your Complainants are unable to either use or sell their property. Denial of the permit constitutes a taking of Complainants' property without compensation.

40. The main purpose of the denial of the fill permit by the Accomack County Wetlands Board and the subse-

quent affirmation of permit denial by the Virginia Resources Commission is to preserve wetlands for public use, benefit, and enjoyment. Permit denial to fill the property in question imposes a preservation easement, for the benefit of the public, upon your Complainants' property by denying the fill permit which is necessary and essential for any economic use of the property by your Complainants.

41. The Board of County Supervisors, Accomack County, Virginia and the Commonwealth of Virginia have refused to compensate your Complainants for the taking of their property.

42. The imposition of the preservation easement wholly frustrates Complainants' reasonable investment backed expectations, denies Complainants all practical, beneficial and economic use of the property, and so wholly destroys the economic value of the property as to constitute a taking of the property without just compensation in violation of the Fifth Amendment to the Constitution of the United States made applicable to the Commonwealth of Virginia and the County of Accomack, Virginia through the Fourteenth Amendment to the Constitution of the United States.

WHEREFORE, your Complainants pray that this Court grant the following relief:

a. Entry of a Decree which declares that the denial to your Complainants of a permit to fill the lots, adjacent roads and commercial area as set out on Exhibit "C" and listed in paragraph 33, by the Accomack County Wetlands Board and the subsequent affirmation of permit denial by the Virginia Marine Resources Commission constitute a taking of Complainants' real property by both the County of Accomack, Virginia through the Accomack County Wetlands Board and by the Commonwealth of Virginia through the Virginia Marine Resources Commission.

b. Entry of a Decree which declares that such permit denial and taking of Complainants' real property by the County of Accomack, Virginia and the Commonwealth of Virginia was a taking without just compensation and that such permit denial and taking is in violation of the Fifth Amendment to the Constitution of the United States made applicable to the Commonwealth of Virginia and Accomack County, Virginia through the Fourteenth Amendment to the Constitution of the United States.

c. Judgment in favor of your Complainants against the County of Accomack, Virginia, and the Accomack County Wetlands Board, and the Commonwealth of Virginia, and the Virginia Marine Resources Commission jointly and severally, in the amount of $194,000.00 as just compensation for the taking of your Complainants' real property at the time of the taking together with interest at the judgment rate from the time of the taking until paid.

d. For a judgment awarding reasonable costs to your Complainants incurred in the prosecution of this action including attorney, appraisal, and engineering fees actually incurred.

e. For such other and further relief as may be necessary and appropriate.

EDWARD LUNN TULL and
LOUISE A. TULL

/s/ Edward Lunn Tull

/s/ Louise A. Tull
By Counsel

/s/ Richard R. Nageotte
RICHARD R. NAGEOTTE
DOUGLAS R. HANSEN
Nageotte & Borinsky, P.C.
14908 Jefferson Davis Highway
Woodbridge, Virginia 22191
Counsel for Complainants

APPENDIX E

AMENDMENT V

CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

SECTION 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Virginia Wetlands Statute, Code of Virginia 1950 as amended, §§ 62.1-13.1 *et seq.*, provides in relevant part:

§ 62.1-13.1. Declaration of policy.—The Commonwealth of Virginia hereby recognizes the unique character of the wetlands, an irreplaceable natural resource which, in its natural state, is essential to the ecological systems of the tidal rivers, bays and estuaries of the Commonwealth.

This resource is essential for the production of marine and inland wildlife, waterfowl, finfish, shellfish and flora; is valuable as a protective barrier against floods, tidal storms and erosion of the shores and soil within the Commonwealth; is important for the absorption of silt and of pollutants; and is important for recreational and aesthetic enjoyment of the people for the promotion of tourism, navigation and commerce.

Continued destruction of Virginia's coastal wetlands will greatly contribute to the pollution of the Commonwealth's rivers, bays and estuaries; will diminish the abundance of Virginia's marine and inland animals and waterfowl, finfish, shellfish and flora as sources of food, employment and recreation for the people of Virginia; will increase costs and hazards associated with floods and tidal storms; and will accelerate erosion and the loss of lands productive to the economy and the well-being of our citizens.

Therefore, in order to protect the public interest, promote the public health, safety and the economic and general welfare of the Commonwealth, and to protect public and private property, wildlife, marine fisheries and the natural environment, it is declared to be the public policy of this Commonwealth to preserve the wetlands and to prevent their despoliation and destruction and to accommodate necessary economic development in a manner consistent with wetlands preservation. (1972, c. 711.)

§ 62.1-13.3. Standards for use and development of wetlands; utilization of guidelines.—The following standards shall apply to the use and development of wetlands and shall be considered in the determination of whether applications required by this chapter should be granted or denied:

(1) Wetlands of primary ecological significance shall not be altered so that the ecological systems in the wetlands are unreasonably disturbed;

(2) Development in Tidewater Virginia, to the maximum extent practical, shall be concentrated in wetlands of lesser ecological significance, in vegetated wetlands which have been irreversibly disturbed before July 1, 1972, in nonvegetated wetlands as described herein which have been irreversibly disturbed prior to January 1, 1983, and in areas of Tidewater Virginia apart from the wetlands.

(3) The provisions of the guidelines promulgated by the Commission pursuant to § 62.1-13.4 of this Code shall be considered in applying the foregoing standards. (1972, c. 711; 1982, c. 300.)

§ 62.1-13.11. **When Commission to review decision of wetlands board.**—The Commission shall review a decision of a wetlands board made under a wetlands zoning ordinance when:

(1) An appeal is taken from such decision by the applicant for a permit or by the county, city or town where the wetlands are located; or

§ 62.1-13.18:1. **Injunctions.**—In addition to and notwithstanding the provisions of § 62.1-13.18, upon petition of the Commission or a wetlands board to the court of record having jurisdiction in the city or county wherein any act is done or is threatened to be done which is unlawful under the provisions of this chapter, the court may enjoin such unlawful act and may order the person so acting unlawfully to take such steps as are necessary to restore, protect and preserve the wetlands involved. (1973, c. 65.)

§ 62.1-13.18:2. **Penalties.**—A. Without limiting the remedies which may be obtained in this chapter, any person who violates any provision of this chapter or who violates or fails, neglects or refuses to obey any Commission or wetlands board notice, order, rule, regulation or permit condition authorized by this chapter shall, upon such finding by an appropriate circuit court, be assessed a

civil penalty not to exceed $25,000 for each day of violation. Such civil penalties may, at the discretion of the court assessing them, be directed to be paid into the treasury of the county, city, or town in which the violation occurred for the purpose of abating environmental damage to, or the restoration of wetlands therein, in such a manner as the court may, by order, direct, except that where the violator is the county, city, or town itself, or its agent, the court shall direct the penalty to be paid into the state treasury.

B. Without limiting the remedies which may be obtained in this chapter, and with the consent of any person who has violated any provision of this chapter or who has violated or failed, neglected or refused to obey any Commission or wetlands board order, rule, regulation, or permit condition authorized by this chapter, the Commission or wetlands board may provide, in an order issued by the Commission or wetlands board against such person, for the one-time payment of civil charges for each violation in specific sums, not to exceed $10,000 for each violation. Civil charges shall be in lieu of any appropriate civil penalty which could be imposed under subsection A of this section. Civil charges may be in addition to the cost of any restoration ordered by the Commission or a wetlands board. (1990, c. 811.)

The Wetlands Zoning Ordinance For Accomack County, §§ 28.2 *et seq.*, provides in relevant part:

SECTION 1. The governing body of Accomack County, acting pursuant to Chapter 2.1 of Title 62.1 of the Code of Virginia, for purposes of fulfilling the policy standards set forth in such chapter, adopts this ordinance regulating the use and development of wetlands.

SECTION 4

(a) Any person who desires to use or develop any wetland within this County, other than for those activities specified in Section 3 above, shall first file an

application for a permit with the wetlands board directly or through the Commission.

(b) An application shall include the following: the name and address of the applicant; a detailed description of the proposed activity and a map, drawn to an appropriate and uniform scale, showing the area of wetland directly affected, with the location of the proposed work thereon, indicating the area of existing and proposed fill and excavation, especially the location, width, depth and length of any proposed channel and the disposal area, all existing and proposed structures; sewage collection and treatment facilities, utility installations, roadways, and other related appurtenances or facilities, including those on adjacent uplands, and the type of equipment ot be used and the means of equipment access to the activity site; the names and addresses of owners of record of adjacent land and known claimants of water rights in or adjacent to the wetland of whom the applicant has notice; an estimate of cost; the primary purpose of the project; any secondary purposes of the project, including further projects; the public benefit to be derived from the proposed project; a complete description of measures to be taken during and after the alteration to reduce detrimental offsite effects; the completion date of the proposed work, project, or structure and such additional materials and documentation as the wetlands board may deem necessary.

(c) A nonrefundable processing fee to cover the cost of processing the application, set by the applicable governing body with due regard for services to be rendered, including the time, skill and administrator's expense involved, shall accompany each application.

SECTION 5. All applications and maps and documents relating thereto shall be open for public inspection at the office of the recording officer of this County.

SECTION 6. Not later than Sixty (60) days after receipt of such application, the wetlands board shall hold a public hearing on such application. The applicant, the local governing body, the Commissioner, the owner of record of any land adjacent to the wetlands in question, known claimants of water rights in or adjacent to the wetlands in question, the Virginia Institute of Marine Science, the Department of Game and Inland Fisheries, Water Control Board, the Department of Highways and governmental agencies expressing an interest therein shall be notified of the hearing by mail not less than twenty (20) days prior to the date set for the hearing. The wetlands board shall also cause notice of such hearing to be published at least once a week for two (2) weeks prior to such hearing in the newspaper having a general circulation in this County. The costs of such publication shall be paid by the applicant.

SECTION 9.

(a) In making its decision whether to grant, to grant in modified form, or to deny an application for a permit the Board shall base its decision on these factors:

1. Such matters raised through the testimony of any person in support of or in rebuttal to the permit application.

2. Impact of the development on the public health and welfare as expressed by the policy and standards of Chapter 2.1 of Title 62.1 of the Code of Virginia and any guidelines which may have been promulgated thereunder by the Commission.

(b) If the Board, in applying the standards above, finds that the anticipated public and private benefit of the Proposed activity exceeds the anticipated public and private detriment and that the proposed activity would not violate or tend to violate the purposes and intent of Chapter 2.1 of Title 62.1 of the Code of

Virginia and of this ordinance, the Board shall grant the permit, subject to any reasonable condition or modification designed to minimize the impact of the activity on the ability of this County, to provide governmental services and on the rights of any other person and to carry out the public policy set forth in Chapter 2.1 of Title 62.1 of the Code of Virginia and in this ordinance. Nothing in this section shall be construed as affecting the right of any person to seek compensation for any injury in fact incurred by him because of the proposed activity. If the Board finds that the anticipated public and private benefit from the proposed activity is exceeded by the anticipated public and private detriment or that the proposed activity would violate the purposes and intent of Chapter 2.1 of Title 62.1 of the Code of Virginia and of this ordinance, the Board shall deny the permit application with leave to the applicant to resubmit the application in modified form.

SECTION 12. No permit granted by a wetlands board shall affect in any way the applicable zoning and land use ordinance of this County.

SECTION 13. The effective date of this ordinance shall be January 1, 1983.

The Virginia Land Subdivision and Development Statute, Code of Virginia 1950 as amended §§ 15.1-465 *et seq.*, provides in relevant part:

§ 15.1-465. **Counties and municipalities to adopt ordinances regulating subdivision and development of land.**— The governing body of any county or municipality shall adopt an ordinance to assure the orderly subdivision of land and its development. Such ordinance shall be adopted by July 1, 1977. The word "subdivision" as used in any such ordinance shall have the meaning set forth in § 15.1-430(1) of this Code. (Code 1950, § 15-781; Code 1950, § 15-967; 1950, p. 183; 1962, c. 407; 1975, c. 641.)

§ 15.1-466. **Provisions of subdivision ordinance.**—A. A subdivision ordinance shall include reasonable regulations and provisions that apply to or provide:

1. For plat details which shall meet the standard for plats as adopted under § 42.1-82 of the Virginia Public Records Act (§ 42.1-76 et seq.);

2. For the coordination of streets within and contiguous to the subdivision with other existing or planned streets within the general area as to location, widths, grades and drainage, including, for ordinances and amendments thereto adopted on or after January 1, 1990, for the coordination of such streets with existing or planned streets in existing or future adjacent or contiguous to adjacent subdivisions;

3. For adequate provisions for drainage and flood control and other public purposes, and for light and air;

4. For the extent to which and the manner in which streets shall be graded, graveled or otherwise improved and water and storm and sanitary sewer and other public utilities or other community facilities are to be installed;

5. For the acceptance of dedication for public use of any right-of-way located within any subdivision or section thereof, which has constructed or proposed to be constructed within the subdivision or section thereof, any street, curb, gutter, sidewalk, bicycle trail, drainage or sewerage system, waterline as part of a public system or other improvement dedicated for public use, and maintained by the locality, the Commonwealth, or other public agency, and for the provision of other site-related improvements required by local ordinances for vehicular ingress and egress, for public access streets, for structures necessary to ensure stability of critical slopes, and for storm water management facilities, financed or to be financed in whole or in part by private funds only if the owner or developer (i) certifies to the governing body that the construction costs have been paid to the person

constructing such facilities; or (ii) furnishes to the governing body a certified check or cash escrow in the amount of the estimated costs of construction or a personal, corporate or property bond, with surety satisfactory to the governing body, in an amount sufficient for and conditioned upon the construction of such facilities, or a contract for the construction of such facilities and the contractor's bond, with like surety, in like amount and so conditioned; or (iii) furnishes to the governing body a bank or savings and loan association's letter of credit on certain designated funds satisfactory to the governing body as to the bank or savings and loan association, the amount and the form. The amount of such certified check, cash escrow, bond, or letter of credit shall not exceed the total of the estimated cost of construction based on unit prices for new public or private sector construction in the locality and a reasonable allowance for estimated administrative costs, inflation, and potential damage to existing roads or utilities.

If a developer records a final plat which may be a section of a subdivision as shown on an approved preliminary plat and furnishes to the governing body a certified check, cash escrow, bond, or letter of credit in the amount of the estimated cost of construction of the facilities to be dedicated within said section for public use and maintained by the locality, the Commonwealth, or other public agency, the developer shall have the right to record the remaining sections shown on the preliminary plat for a period of five years from the recordation date of the first section, subject to the terms and conditions of this subsection and subject to engineering and construction standards and zoning requirements in effect at the time that each remaining section is recorded. In the event a governing body of a county, wherein the highway system is maintained by the Department of Transportation, has accepted the dedication of a road for public use and such road due to factors other than its quality of construction is not acceptable into the secondary system

of state highways, then such governing body may, if so provided by its subdivision ordinance, require the subdivider or developer to furnish the county with a maintenance and indemnifying bond, with surety satisfactory to the governing body, in an amount sufficient for and conditioned upon the maintenance of such road until such time as it is accepted into the secondary system of state highways. In lieu of such bond, the governing body may accept a bank or savings and loan association's letter of credit on certain designated funds satisfactory to the governing body as to the bank or savings and loan association, the amount and the form, or accept payment of a negotiated sum of money sufficient for and conditioned upon the maintenance of such road until such time as it is accepted into the secondary system of state highways and assume the subdivider's or developer's liability for maintenance of such road. "Maintenance of such road" shall be deemed to mean maintenance of the streets, curb, gutter, drainage facilities, utilities or other street improvements, including the correction of defects or damages and the removal of snow, water or debris, so as to keep such road reasonably open for public usage;

6. For conveyance, in appropriate cases, of common or shared easements to franchised cable television operators furnishing cable television and public service corporations furnishing cable television, gas, telephone and electric service to the proposed subdivision. Such easements, the location of which shall be adequate for use by public service corporations which may be expected to occupy them, may be conveyed by reference on the final plat to a declaration of the terms and conditions of such common easements agreed to franchised cable television operators furnishing cable television and by such public service corporations and recorded in the land records of the county or city. The failure of any such franchised cable television operator to agree to the terms and conditions set out in such declaration shall not defeat or impair any such common easement conveyance;

7. For monuments of specific types to be installed establishing street and property lines;

8. That unless a plat is filed for recordation within six months after final approval thereof or such longer period as may be approved by the governing body, such approval shall be withdrawn and the plat marked void and returned to the approving official;

9. For the administration and enforcement of such ordinance, not inconsistent with provisions contained in this chapter, and specifically for the imposition of reasonable fees and charges for the review of plats and plans, and for the inspection of facilities required by any such ordinance to be installed; such fees and charges shall in no instance exceed an amount commensurate with the services rendered taking into consideration the time, skill and administrator's expense involved. All such charges heretofore made are hereby validated;

10. For payment by a subdivider or developer of land of the pro rata share of the cost of providing reasonable and necessary sewerage, water, and drainage facilities, located outside the property limits of the land owned or controlled by the subdivider or developer but necessitated or required, at least in part, by the construction or improvement of the subdivision or development; however, no such payment shall be required until such time as the governing body or a designated department or agency thereof shall have established a general sewer, water, and drainage improvement program for an area having related and common sewer, water, and drainage conditions and within which the land owned or controlled by the subdivider or developer is located. Such regulations shall set forth and establish reasonable standards to determine the proportionate share of total estimated cost of ultimate sewerage, water, and drainage facilities required adequately to serve a related and common area, when and if fully developed in accord with the adopted comprehensive plan, that shall be borne by each subdivider or de-

veloper within the area. Such share shall be limited to the proportion of such total estimated cost which the increased sewage flow, water flow, and/or increased volume and velocity of storm water runoff to be actually caused by the subdivision or development bears to total estimated volume and velocity of such sewage, water, and/or runoff from such area in its fully developed state.

Each such payment received shall be expended only for the construction of those facilities identified in the established sewer, water, and drainage program; however, in lieu of such payment the governing body may provide for the posting of a personal, corporate or property bond, cash escrow or other method of performance guarantee satisfactory to it conditioned on payment at commencement of such construction. The payments received shall be kept in a separate account for each of the individual improvement programs until such time as they are expended for the improvement program;

11. Any funds collected for pro rata programs under subdivision 10 of this subsection prior to July 1, 1990, shall continue to be held in separate, interest bearing accounts for the project or projects for which the funds were collected and any interest from such accounts shall continue to accrue to the benefit of the subdivider or developer until such time as the project or projects are completed or until such time as a general sewer and drainage improvement program is established to replace a prior sewer and drainage improvement program. If such a general improvement program is established, the governing body of any county or municipality may abolish any remaining separate accounts and require the transfer of the assets therein into a separate fund for the support of each of the established sewer, water, and drainage programs. Upon the transfer of such assets subdividers and developers who had met the terms of any existing agreements made under a previous pro rata program shall receive any outstanding interest which has accrued up to the date of transfer, and such subdividers

and developers shall be released from any further obligation under those existing agreements. The transferred assets shall be the sole property of the county or municipality which established the general improvement program;

12. For reasonable provisions permitting a single division of a lot or parcel for the purpose of sale or gift to a member of the immediate family of the property owner, subject only to any express requirement contained in the Code of Virginia and to any requirement imposed by the local governing body that all lots of less than five acres have reasonable right-of-way of not less than ten feet or more than twenty feet providing ingress and egress to a dedicated recorded public street or thoroughfare. Only one such division shall be allowed per family member, and shall not be for the purpose of circumventing this subdivision. For the purpose of this subdivision, a member of the immediate family is defined as any person who is a natural or legally defined offspring, spouse, grandchild, grandparent, or parent of the owner. The provisions of this subdivision shall apply only to subdivision ordinances adopted by counties and the City of Suffolk;

13. For reasonable provisions, notwithstanding subdivision A 12, in a county having the urban county executive form of government permitting a single division of a lot or parcel for the purpose of sale or gift to a member of the immediate family of the property owner, subject only to any express requirement contained in the Code of Virginia and to any requirement imposed by the local governing body that all lots of less than five acres have frontage of not less than ten feet or more than twenty feet on a dedicated recorded public street or thoroughfare. Only one such division shall be allowed per family member, and the division shall not be for the purpose of circumventing a local subdivision ordinance. For the purpose of this subsection, a member of the immediate family is defined as any person who is a natural or legally defined offspring or parent of the owner;

14. For the periodic partial and final complete release of any bond, escrow, letter of credit, or other performance guarantee required by the governing body under this section within thirty days after receipt of written notice by the subdivider or developer of completion of part or all of any facilities required to be constructed hereunder unless the governing body or its designated administrative agency notifies said subdivider or developer in writing of nonreceipt of approval by applicable state agency, or of any specified defects or deficiencies in construction and suggested corrective measures prior to the expiration of the thirty-day period.

If no such action is taken by the governing body or administrative agency within the time specified above, the request shall be deemed approved, and a partial release granted to the subdivider or developer. No final release shall be granted until after expiration of such thirty-day period and there is an additional request in writing sent by certified mail return receipt to the chief administrative officer of such governing body. The governing body or its designated administrative agency shall act within ten working days of receipt of the request; then if no action is taken the request shall be deemed approved and final release granted to the subdivider or developer.

No governing body or administrative agency shall refuse to make a periodic partial or final release of a bond, escrow, letter of credit, or other performance guarantee for any reason not directly related to the specified defects or deficiencies in construction of the facilities covered by said bond, escrow, letter of credit or other performance guarantee.

Upon written request by the subdivider or developer, the governing body or its designated administrative agency shall be required to make periodic partial releases of such bond, escrow, letter of credit, or other performance guarantee in a cumulative amount equal to

no less than eighty percent of the original amount for which the bond, escrow, letter of credit, or other performance guarantee was taken, and may make partial releases to such lower amounts as may be authorized by the governing body or its designated administrative agency based upon the percentage of facilities completed and approved by the governing body, local administrative agency, or state agency having jurisdiction. Periodic partial releases may not occur before the completion of at least thirty percent of the facilities covered by any bond, escrow, letter of credit, or other performance guarantee. The governing body or administrative agency shall not be required to execute more than three periodic partial releases in any twelve-month period. Upon final completion and acceptance of said facilities, the governing body or administrative agency shall release any remaining bond, escrow, letter of credit, or other performance guarantee to the subdivider or developer. For the purpose of final release the term "acceptance" is deemed to mean: when said public facility is accepted by and taken over for operation and maintenance by the state agency, local government or agency, or other public authority which is responsible for maintaining and for operating such facility upon acceptance.

For the purposes of this subsection, a certificate of partial or final completion of such facilities from either a duly licensed professional engineer or land surveyor, as defined in and limited to § 54.1-400, or from a department or agency designated by the local government may be accepted without requiring further inspection of such facilities.

B. A subdivision ordinance may include provisions for variations in or exceptions to the general regulations of the subdivision ordinance in cases of unusual situations or when strict adherence to the general regulations would result in substantial injustice or hardship.

C. A subdivision ordinance may require the furnishing of a preliminary opinion from the applicable health

official regarding the suitability of a subdivision for installation of subsurface sewage disposal systems where such method of sewage disposal is to be utilized in the development of a subdivision.

D. A subdivision ordinance may require that, in the event streets in a subdivision will not be constructed to meet the standards necessary for inclusion in the secondary system of state highways or for state street maintenance moneys paid to municipalities, the subdivision plat and all approved deeds of subdivision, or similar instruments, must contain a statement advising that the streets in the subdivision do not meet state standards and will not be maintained by the Department of Transportation or the county or the municipalities enacting the ordinance. Grantors of any subdivision lots to which such statement applies must include the statement on each deed of conveyance thereof. However, counties and municipalities in their ordinance may establish minimum standards for construction of streets that will not be built to state standards.

For streets constructed or to be constructed, as provided for in this subsection, a subdivision ordinance may require that the same procedure be followed as that set forth in subdivision A 5 of this section. Further, the subdivision ordinance may provide that the developer's financial commitment shall continue until such time as the local government releases such financial commitment in accordance with the provisions of subdivision A 14 of this section.

E. A subdivision ordinance may include reasonable provision for the voluntary funding of off-site road improvements and reimbursements of advances by the governing body. If a subdivider or developer makes an advance of payments for or construction of reasonable and necessary road improvements located outside the property limits of the land owned or controlled by him, the need for which is substantially generated and reasonably re-

quired by the construction or improvement of his subdivision or development, and such advance is accepted, the governing body may agree to reimburse the subdivider or developer from such funds as the governing body may make available for such purpose from time to time for the cost of such advance together with interest, which shall be excludable from gross income for federal income tax purposes, at a rate equal to the rate of interest on bonds most recently issued by the governing body on the following terms and conditions:

1. The governing body shall determine or confirm that the road improvements were substantially generated and reasonably required by the construction or improvement of the subdivision or development and shall determine or confirm the cost thereof, on the basis of a study or studies conducted by qualified traffic engineers and approved and accepted by the subdivider or developer.

2. The governing body shall prepare, or cause to be prepared, a report accepted and approved by the subdivider or developer, indicating the governmental services required to be furnished to the subdivision or development and an estimate of the annual cost thereof for the period during which the reimbursement is to be made to the subdivider or developer.

3. The governing body may make annual reimbursements to the subdivider or developer from funds made available for such purpose from time to time, including but not limited to real estate taxes assessed and collected against the land and improvements on the property included in the subdivision or developments in amounts equal to the amount by which such real estate taxes exceed the annual cost of providing reasonable and necessary governmental services to such subdivision or development.

F. Site plan or plans of development which are required to be submitted and approved in accordance with

§ 15.1-491(h) shall be subject to the provisions of this section, mutatis mutandis.

G. Notwithstanding subdivisions A 12 and A 13 of this section, a subdivision ordinance may include reasonable provisions permitting divisions of lots or parcels for the purpose of sale or gift to a member of the immediate family of the property owner in (i) any county or city which has had population growth of ten percent or more from the next-to-latest to latest decennial census year, based on population reported by the United States Bureau of the Census, provided that until the 1990 census is reported, any county or city instead may qualify only if it has had an estimated population growth of ten percent or more from 1980 to the most recent year for which population estimates are available from the Center for Public Service of the University of Virginia; (ii) any city or county adjoining such city or county; (iii) any towns located within such county; and (iv) any county contiguous with at least three such counties, and any town located in that county. Such divisions shall be subject to all requirements of the Code of Virginia and to any requirements imposed by the local governing body. (Code 1950, §§ 15-781, 15-967.1; 1950, p. 183; 1962, c. 407; 1970, c. 436; 1973, cc. 169, 480; 1975, c. 641; 1976, c. 270; 1978, cc. 429, 439, 440; 1979, cc. 183, 188, 395; 1980, cc. 379, 381; 1981, c. 348; 1983, cc. 167, 609; 1984, c. 111; 1985, cc. 422, 455; 1986, c. 54; 1987, c. 717; 1988, cc. 279, 735; 1989, cc. 332, 393, 403, 495; 1990, cc. 170, 176, 287, 708, 973; 1991, cc. 30, 47, 288, 538.)

§ 15.1-475. **Plat of proposed subdivision and site plans to be submitted for approval.**—Whenever the owner or proprietor of any tract of land located within any territory to which a subdivision ordinance applies desires to subdivide the same, he shall submit a plat of the proposed subdivision to the local commission of the county or municipality, or an agent designated by the governing body thereof for such purpose. When any part of the land proposed for subdivision lies in a drainage district such

fact shall be set forth on the plat of the proposed subdivision. When any grave, object or structure marking a place of burial is located on the land proposed for subdivision, such grave, object or structure shall be identified on any plans or site plans required by this article. When the land involved lies wholly or partly within an area subject to the joint control of more than one political subdivision, the plat shall be submitted to the local commission or other designated agent of the political subdivision in which the tract of land is located. Site plan or plans of development required by § 15.1-491(h) shall also be subject to the provisions of this section, mutatis mutandis.

The local commission or other agent shall act on any proposed plat within sixty days after it has been officially submitted for approval by either approving or disapproving such plat in writing, and giving with the latter specific reasons therefor. Specific reasons for disapproval may be contained in a separate document or may be written on the plat itself. The reasons for disapproval shall identify deficiencies in the plat which cause the disapproval by reference to specific duly adopted ordinances, regulations, or policies and shall generally identify such modifications or corrections as will permit approval of the plat.

If the local commission or other agent fails to approve or disapprove the plat within sixty days after it has been officially submitted for approval the subdivider, after ten days' written notice to the commission, or agent, may petition the circuit court of the county or municipality in which the land involved, or the major part thereof, is located, to decide whether the plat should or should not be approved. The court shall hear the matter and make and enter such order with respect thereto as it deems proper, which may include directing approval of the plat.

If a local commission or other agent disapproves a plat and the subdivider contends that such disapproval was

not properly based on the ordinance applicable thereto, or was arbitrary or capricious, he may appeal to the circuit court having jurisdiction of such land and the court shall hear and determine the case as soon as may be, provided that his appeal is filed with the circuit court within sixty days of the written disapproval by such local commission or other agent.

Nothing in this article shall be deemed to prohibit the local governing body from providing in its ordinance for the submission of preliminary subdivision plats for tentative approval. The local agent designated by the local commission or the agent designated by the governing body to review preliminary subdivision plats or the local commission shall complete action on such preliminary plats within sixty days of submission to such agent. However, if approval of a feature or features of the preliminary plat by a state agency is necessary, the local agent shall forthwith forward the preliminary plat to the appropriate state agency or agencies for review.

Any state agency making such a review of a plat forwarded to it under this section, including, without limitation, the Virginia Department of Transportation, shall complete its review within forty-five days of receipt of such preliminary plat. If the state agency does not approve the plat, it shall comply with the requirements, and be subject to the restrictions, set forth in the second paragraph of this section (except for the time period therein specified). Upon receipt of the approvals from all state agencies, the local agent shall act upon a preliminary plat within thirty-five days.

If a planning commission has the responsibility of review of preliminary plats and conducts a public hearing, it shall act on such plat within forty-five days after receiving approval from all state agencies. If the local agent or commission does not approve the preliminary plat, the local agent or commission shall set forth in writing the reasons for such denial and shall state what cor-

rections or modifications will permit approval by such agent or commission; provided, however, that no local commission or agent shall be required to approve a preliminary subdivision plat in less than sixty days from the date of its original submission to the local commission or agent, and that all actions on preliminary subdivision plats shall be completed by the local agent or commission and, if necessary, state agencies, within a total of ninety days of submission to the local agent or commission.

If the local commission or other agent fails to approve or disapprove the preliminary plat within ninety days after it has been officially submitted for approval, the subdivider after ten days' written notice to the commission, or agent, may petition the circuit court of the county or municipality in which the land involved, or the major part thereof, is located to enter such order with respect thereto as it deems proper, which may include directing approval of the plat.

If a local commission or other agent disapproves a preliminary plat and the subdivider contends that such disapproval was not properly based on the ordinance applicable thereto, or was arbitrary or capricious, he may appeal to the circuit court having jurisdiction of such land and the court shall hear and determine the case as soon as may be, provided that his appeal is filed with the circuit court within sixty days of the written disapproval by such local commission or other agent. (Code 1950, §§ 15-789, 15-967.10; 1952, c. 333; 1962, c. 407; 1964, c. 498; 1975, c. 641; 1977, c. 10; 1978, c. 283; 1979, c. 111; 1980, c. 73; 1986, c. 483 1989, cc. 471, 495; 1990, c. 171.)

§ 15.1-476. **Requisites of plat.**—Every subdivision plat which is intended for recording shall be prepared by a certified professional engineer or land surveyor, who shall endorse upon each such plat a certificate signed by him setting forth the source of title of the owner of the

land subdivided and the place of record of the last instrument in the chain of title; when the plat is of land acquired from more than one source of title, the outlines of the several tracts shall be indicated upon such plat. Provided, however, that nothing herein shall be deemed to prohibit the preparation of preliminary studies, plans, or plats of a proposed subdivision by the owner of the land, city planners, land planners, architects, landscape architects, or others having training or experience in subdivision planning or design. (Code 1950, § 15-790; Code 1950, § 15-967.11; 1962, c. 407.)

§ 15.1-477. Statement of consent to subdivision; execution; acknowledgment and recordation.—Every such plat, or deed of dedication to which the plat is attached, shall contain in addition to the professional engineer's or land surveyor's certificate a statement as follows: The platting or dedication of the following described land (here insert a correct description of the land subdivided) is with the free consent and in accordance with the desire of the undersigned owners, proprietors, and trustees, if any. The statement shall be signed by such persons and duly acknowledged before some officer authorized to take acknowledgment of deeds. When thus executed and acknowledged, the plat, subject to the provisions herein, shall be filed and recorded in the office of the clerk of court where deeds are admitted to record for the lands contained in the plat, and indexed in the general index to deeds under the names of the owners of lands signing such statement, and under the name of the subdivision. (Code 1950, § 15-791; Code 1950, § 15-967.12; 1954, c, 421; 1962, c. 407.)

The Subdivision Ordinance For Accomack County, Virginia provides in relevant part:

An ordinance to regulate the subdivision of property into lots, streets and other public areas, to provide for the making and recording of plats of such subdivision

and the certification of same and provide for the approval of plats.

In accordance with Article 7 of the Virginia Planning Act as found in the Code of Virginia, 1950, as amended, Section 15.1-465, et seq., the Board of Supervisors of Accomack County, Virginia, hereby adopts the following regulations for the subdivision of all land except the territory of the incorporated towns within the jurisdiction of Accomack County. These regulations shall not apply to either de facto or de jure subdivisions recorded prior to the effective date of this ordinance.

1-1. PURPOSE

The purpose of this ordinance is to establish certain subdivision standards and procedures for Accomack County, Virginia, and such of its environs as come under the jurisdiction of the governing body as provided for by the 1950 Code of Virginia, as amended, in order to guide and facilitate the orderly beneficial growth of the community and to promote the public health, safety, convenience, comfort, prosperity and general welfare.

1-2. This ordinance is known and may be cited as the "Subdivision Ordinance for Accomack County, Virginia."

WORDS AND TERMS

For the purpose of this ordinance, certain words and terms used herein shall be interpreted or defined as follows: Words used in the present tense include the future, words in the singular number include the plural and the singular, unless the natural construction of the work indicates otherwise; the word "lot" includes the word "parcel"; the word "shall" is mandatory and not discretionary; the word "approve" shall be considered to be followed by the words "or disapprove"; any reference to this ordinance includes all ordinances amending or supplementing the same; all distances and areas refer to measurements in a horizontal plane.

2-1. AGENT: The representative of the governing body who has been appointed to serve as the agent of the Board in approving the subdivision plats.

2-1-1. BUILDING: Any structure having a proof supported by columns or walls, for housing or enclosure of persons, animals or chattels.

Added June 18, 1980.

2-2. DEVELOPER: An owner of property being subdivided, whether or not represented by his agent.

2-3. EASEMENT: A grant by a property owner of the use of land for specific purpose or purposes.

2-4. ENGINEER: An engineer licensed by the Commonwealth of Virginia.

Amended June 18, 1980.

2-5. GOVERNING BODY: The Board of Supervisors of Accomack County, Virginia.

2-6. HEALTH OFFICIAL: The Health Director or sanitarian for Accomack County, Virginia.

2-7. HIGHWAY ENGINEER: The Resident Engineer employed by the Virginia Department of Highways.

2-8. JURISDICTION: The area or territory subject to the legislative control of the governing body.

2-9. LOT: A numbered and recorded portion of a subdivision intended for transfer of ownership, lease, rental or for building development.

Amended June 18, 1980.

2-10. LOT, CORNER: A lot abutting upon two (2) or more streets at their intersection; the shorter side fronting upon a street shall be considered the front of the lot, and the longest side fronting upon a street shall be considered the side of the lot.

2-11. LOT, WIDTH OF: the mean horizontal distance between the side lot lines.

2-12. PLAT: Includes the terms; map, plan, plot, replat, or replot; a map or plan of a tract or parcel of land which is to be, or which has been subdivided. When used as a verb "plat" is synonymous with "subdivide".

2-13. PROPERTY: Any tract, lot, parcel or several of the same collected together for the purpose of subdividing.

2-14. STREET: The principal means of access to abutting properties.

2-14.1. PRIVATE STREET: A street owned by one or more persons, restricted in use, and not maintained by the State Highway Department, or one not intended by the subdivider for acceptance into the State Highway System.

2-14-2. PUBLIC STREET: A street maintained by the State Highway Department or one intended by the subdivider for acceptance into the State Highway System and approved by highway engineer as meeting State Highway Department specifications.

2-15. STREET, PUBLIC USE OF: The unrestricted use of specified area or right-of-way for ingress and egress to two or more abutting properties.

2-16. STREET WIDTH: The total width of the strip of land dedicated or reserved for travel, including roadway, curbs, gutters, sidewalks and planting strips.

2-17. SUBDIVISION: The division of any tract, lot or parcel or land into more than four (4) parts, regardless of whether the individual lots or tracts are sold, leased or rented, except that the following divisions of land shall not be considered subdivisions:

(a) divisions ordered by a court of competent jurisdiction,

(b) divisions made solely for agricultural or timber purposes,

(c) divisions by deed of gift or will,

(d) divisions whereby a parcel is separated in order to become a permanent part of an adjoining tract, and

(e) divisions creating building sites for family members of the owner of the property, provided the lots satisfy the minimum lot size requirement of this ordinance.

(f) divisions in which each single parcel contains three (3) or more acres, (*subject to Section 5-3.1*). Added June 18, 1980 Amended September 19, 1984.

2-17.1 Repealed April 12, 1978.

2-17.2 The word "subdivision" and any derivative thereof shall have reference to the term "subdivider" as defined in Section 2-18.

2-18. SUBDIVIDER: An individual, corporation or registered partnership, owning any tract, lot or parcel of land to be subdivided, or a group of two or more persons owning any tract, lot or parcel of land to be subdivided, who have given their power of attorney to one of their group or to another individual to act on their behalf in planning, negotiating for, in representing or executing the legal requirements of the subdivision.

2-19. SURVEYOR: A surveyor licensed by the Commonwealth of Virginia.

Amended June 18, 1980.

4-1. PLATTING REQUIRED

Any owner or developer of any tract of land situated within the County who subdivides the same shall cause a plat of such subdivision, with reference to known or permanent monuments, to be made and recorded in the office of the clerk of the appropriate court. No such plat of subdivision shall be recorded unless and until it shall

have been submitted, approved, and certified by the agent in accordance with the regulations set forth in this ordinance. No lot shall be sold, leased or rented in any such subdivision before the plat of the whole subdivision shall have been recorded.

Amended June 18, 1980.

4-2. NO ONE EXEMPT

No person shall subdivide any tract of land that is located within the County except in conformity with the provisions of this ordinance.

5-1. SUBDIVIDER'S RESPONSIBILITY

All physical improvements in a subdivision shall be installed by the subdivider at his cost, except that the subdivider shall not be required to install individual septic tanks and individual wells where private water and sewer systems are intended for each lot. In cases where specifications for improvements have been established either by the State Health Department for central water and central sewer systems, or by the State Highway Department or this ordinance for streets and drainage facilities, such specifications shall be followed in the design and construction of these improvements with the following being the only exception.

6-1. Before the agent will give final approval to any subdivision plat, the subdivider or developer shall be required to insure his performance in accordance with specifications and construction schedules established on certain planned improvements. Performance security in an amount determined by the agent to be sufficient to pay the total cost of the improvements being secured shall be required in all subdivisions for public streets and accompanying drainage construction and for central water and/or sewer. In determining the costs for various improvements the agent may consult an engineer who shall prepare written construction cost estimates for the agent, or the agent may require that bona fide cost estimates for improvements be furnished by the subdivider.

8-8. FINAL PLAT—APPROVAL AND RECORDING

After the agent determines that the subdivider has complied with all the requirements of this Ordinance, the agent shall indicate his approval of the final plat in writing upon the face of the plat. The County Clerk shall record the approved plat when it is submitted by the subdivider. If the subdivider fails to have the plat recorded within sixty (60) days following the date of approval, the agent shall mark the plat "VOID" and return same to subdivider.

92-112

No. 92-102

FILED
AUG 14 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

EDWARD L. TULL AND LOUISE A. TULL,

Petitioners,

v.

COMMONWEALTH OF VIRGINIA

and

BOARD OF SUPERVISORS
OF ACCOMACK COUNTY, VIRGINIA,

Respondents.

Petition For Writ Of Certiorari
To The Supreme Court Of Virginia

BRIEF OF BOARD OF SUPERVISORS OF ACCOMACK COUNTY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a writ of certiorari should be granted to consider the possibility of requiring a county which has properly regulated wetlands use to pay damages to petitioners who were denied a permit to fill wetlands constituting a small fraction of a valuable parcel of land acquired by petitioners long after the pertinent regulations were in place, which were subdivided and isolated from the balance of the parcel by petitioners in such a way as to minimize their value, and which were of only nominal value when acquired by petitioners?

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No. 92-102

In The

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October Term, 1992

EDWARD L. TULL AND LOUISE A. TULL,

Petitioners,

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COMMONWEALTH OF VIRGINIA

and

BOARD OF SUPERVISORS
OF ACCOMACK COUNTY, VIRGINIA,

Respondents.

Petition For Writ Of Certiorari
To The Supreme Court Of Virginia

BRIEF OF BOARD OF SUPERVISORS OF ACCOMACK COUNTY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

The facts of this case are straightforward and largely undisputed though some important facts were avoided by Petitioners in their Statement of the Case. In 1972, the General Assembly of the Commonwealth of Virginia enacted Chapter 2.1 of Title 62.1 of the Code of Virginia, known as the Wetlands Act, requiring, among other things, permits to be obtained for the filling of wetlands.

The regulatory scheme established by the Act provides for direct regulation by the Virginia Marine Resources Commission (VMRC) (Code of Virginia §62.1-13.9) unless the particular locality in question has adopted, *verbatim*, the model ordinance regulating wetlands set out at Code of Virginia §62.1-13.5. In 1972, the Accomack Board of Supervisors adopted the Wetlands Ordinance set out in Code of Virginia §62.1-13.5 and established the Accomack County Wetlands Board.[1]

In 1980, fully eight years after the Wetlands Act and Ordinance were adopted, Petitioners (hereinafter, "Tulls" or "Petitioners"), acquired an undivided one-third interest in 43 acres which included that now in dispute and in 1983 the Tulls acquired the remaining two-thirds interest. Trans. at 115, 116, 117, 190. The Tulls sought to subdivide 12 acres of the 43 acres into something designated "Ocean Breeze Mobile Home Sites, Section D" as shown on a certain plat received into evidence as Exhibit 5 A, (Trans. at 64). In 1985, the proposed subdivision was approved as a ministerial act and, quite properly, without inquiry about whether or not

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[1] If a locality does adopt such an ordinance, permit applications are to be filed with and acted on by the local Wetlands Board. However, every action of a local Wetlands Board is reviewed by the Commissioner of the VMRC pursuant to Code of Virginia §62.1-13.10 and the VMRC itself has absolute authority to modify or reverse any decision of the local Wetlands Board that does not achieve or comply with the VMRC's policies, standards, or guidelines. Code of Virginia §62.1-13.13. This regulatory scheme led Accomack County to argue to the Trial Court that any liability for the enforcement of the Wetlands Act should be the Commonwealth's alone. The disposition of the case made it unnecessary for either the Trial Court or the Virginia Supreme Court to decide this question.

wetlands were involved.[2] Trans. at 80. To this point no permit to fill had been sought, but the Tulls, who had been in litigation regarding wetlands on other tracts since the 1970s, (Trans. at 203), deemed it appropriate to include a notation on the Ocean Breeze plat stating at note 7 that:

> Portions of some lots may contain land defined as wetlands by State and Federal agencies. The lot purchaser of said lot purchases same as is and saves harmless the Developer from all responsibility from any damages that might result from that land being filled or otherwise altered by the lot owner.
>
> Plat, Exhibit 5 A.

A portion of the Ocean Breeze, Section D, subdivision was, in fact, wetlands subject to the Wetlands Act. In 1987, the Tulls sought a permit from the local Wetlands Board to fill those wetlands, amounting to about two acres, purporting to be separated from the uplands by the Tulls' subdivision scheme, which permit was denied. Trial Stipulation of Facts and Exhibits #6. The denial was appealed by the Tulls to the VMRC where the Tulls argued that failure to grant the permit would amount to an unconstitutional taking, the constitutional argument

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[2] There is no provision in Accomack County's subdivision ordinance or state law which requires that property be identified as wetlands or otherwise prior to subdivision. Subdivision is a purely ministerial act by the County agent.

being specifically rejected by the VMRC. Trial Stipulation of Facts and Exhibits #7.[3]

Edward Tull presented rather convoluted evidence as to his expenditures and receipts on the 43-acre original parcel, the 12- acre parcel designated Ocean Breeze, Section D, and the two acres for which the permit was sought. It is worth noting that the Tulls' evidence on expenses included tens of thousands of dollars in attorneys' fees relating to the instant litigation (Trans. at 137), tens of thousands of dollars in attorneys' fees relating to earlier unrelated wetlands litigation in the federal courts (Trans. at 138), $25,000 paid by the Tulls to the United States as civil damages which was a rebate of money earlier paid *to* the Tulls by the United States in an unrelated case (Trans. at 135, 136), and $102,210 for roadwork done well *after* the permit had been denied (Trans. at 208). The Trial Court found as a fact that, without the litigation costs, the Tulls would under their own evidence

---

[3] The VMRC is mandated to modify, reverse or remand decisions of local wetlands boards which are in "violation of constitutional provisions". Code of Virginia §62.1-13.13(2)(a). The Tulls did not appeal the VMRC's Action to the Accomack County Circuit Court, which they could have done pursuant to Code of Virginia §62.1-13.15, and where they could have argued that the permit must be granted since to deny it would amount to an unconstitutional taking of the two acres. Instead, the Tulls sought compensation for the alleged taking, resulting in the litigation at bar. Accomack County argued at trial that the constitutional finding of no taking by the VMRC became the law of the case when it was not appealed by Petitioners. This argument was rejected by the Trial Court and raised in the Virginia Supreme Court (by assignment of cross error). That Court was not required to decide it since it affirmed the Trial Court's decision in favor of Accomack County on other grounds.

have made a sizeable profit on the Ocean Breeze project (Trans. at 343, 344), even without reference to the many other lots sold elsewhere in the 43 acres for more than $400,000 and to the many lots yet to be sold by them (Trans. at 196 and 218).

The Tulls presented evidence from a qualified appraiser on the value of the two acres with and without the permit to fill. (Trans. 33-63). Unfortunately for Petitioners' case, the appraiser testified on cross-examination that wetlands which are a portion of a developable lot may have more value than those which are segregated or isolated by the subdivider's choice (Trans. at 40-45); that a rational buyer discounts the price he or she is willing to pay for wetlands because of the uncertainty of obtaining a permit to fill, (Trans. at 46-47), and even that the property in question had virtually no value *when Petitioners acquired* it. (Trans. at 50, 51).

Neither the Commonwealth nor the County presented evidence, arguing that the Tulls had shown no damages (Trans. at 301) and that, if there had been diminution in value due to the permit denial, it was not so substantial as to amount to a compensable taking. The Trial Court found that the petitioners were not entitled to damages because there had been no taking in as much as the Tulls had not lost all "viable economic use" of the property. Petitioners' Appendix at 4a and 5a.[4]

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[4] In reaching its conclusion, the Trial Court decided that the "parcel as a whole" for its takings analysis was neither the lots urged by the Tulls (amounting to about two acres) nor the 43 acres originally acquired by Petitioners (as argued by Respondents) but rather, the approximately twelve acres consisting of

It is surely by design that Petitioners in their Statement of the Case neglected to draw the Court's attention to the facts that they acquired their property long after the Wetlands regulations were in place, that their own expert testified that the wetlands were of only nominal value when acquired, and that the Petitioners subdivided the property in such a way as to segregate and minimize the value of the wetlands here in question. Petitioners' arguments rely in part upon tax assessments and expenditures based upon Petitioners' own subdivision of their property without regard to whether or not a permit to fill the wetlands could be obtained. Petition at 4-6. It would be bizarre if a public entity such as Accomack County were required by this Court to reward Petitioners for what were regulated and virtually valueless wetlands when acquired by Petitioners and which were managed by Petitioners in such a way as to minimize what little value the property had.

REASONS FOR DENYING THE WRIT

Petitioners, wishing to fill a particular two acre tract of wetlands and having already exploited the uplands adjacent to that tract of wetlands, require a rule from this Court which would essentially mandate compensation

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the subdivision of which the wetlands here in question are a part. Because that twelve acre parcel, even without a permit to fill the two acres of wetlands in question, was demonstrably economically valuable and, in fact, had generated a substantial profit for the Tulls, the Court found that there had been no taking. Petitioners' Appendix 4a and 5a.

whenever a permit to fill wetlands is denied. To rationalize this result, Petitioners urge this Court to announce that, in takings analyses, the economic impact of the regulatory action be measured only against the ownership interest which is directly regulated, here the wetlands, rather than against some more encompassing entity, here the larger tract including profitable uplands.

To satisfy the criteria of Rule 10 of the United States Supreme Court Rules, Petitioners argue that "confusion" abounds regarding the meaning and application of the "parcel as a whole" doctrine made prominent in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), (*"Penn Central"*). In support of this allegation, Petitioners cite cases from this Supreme Court and elsewhere purporting to show that there is controversy about the parcel as a whole concept to the extent that some courts faced with the facts in the case at bar would deem the wetlands to be the parcel as a whole for consideration, in contrast to the decision of the Supreme Court of Virginia.

In actual fact, though there is clearly debate on the appropriate unit against which to measure diminishment of value in regulatory takings cases as exemplified by Chief Justice Rehnquist's dissents in *Penn Central* and in *Keystone Bituminous Coal Association v. DeBenedictus*, 480 U.S. 470 (1987) (*"Keystone Coal"*), there really is no serious controversy about the parcel as a whole concept insofar as it would apply to the case at bar. Because this brief is merely a response in opposition to the granting of a writ of certiorari and because the reason advanced for the granting of the writ is the supposed "confusion" on the parcel as a whole issue raised by Petitioners, this

response will focus on rebutting that allegation of confusion. To that end, Respondent Accomack County proposes simply to examine the cases cited by Petitioners in support of its argument. Such an examination proves unambiguously that there is no reason to believe that any federal court of appeals or state court of last resort would have decided this case any differently than did the Supreme Court of Virginia.

1. United States Supreme Court

Petitioners in this case have seized upon this Court's recent decision, *Lucas v. South Carolina Coastal Council*, ___ U.S. ___ (1992) No. 91-453, slip op. (June 29, 1992) ("*Lucas*"), and in particular, footnote 7 in Justice Scalia's opinion wherein he remarks that

> this uncertainty regarding the composition of the denominator in our "deprivation" fraction has produced inconsistent pronouncements by the Court.
>
> *Lucas*, slip op., at 11, n. 7.

as reason to hope that the Court is somehow ready to discard the *Penn Central* concept of parcel as a whole and, instead, adopt a more limited view of the "denominator" imagined by Petitioners to have been established in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) ("*Mahon*"). It does not appear to Respondent Accomack County that *Lucas* gives Petitioners any help. First, *Lucas* simply did not present a situation in which the parcel as a whole was in any way controverted. There was no suggestion that there was any interest in land that could be considered more expansive than the fee simple interest in the lots

pleaded by Lucas and, though deemed to be a questionable finding by four justices (Justice Kennedy, concurring, *Lucas*, slip op. at 2, Justice Blackmun, dissenting, *Lucas*, slip op. at 9, 10, Justice Stevens, dissenting, *Lucas*, slip op. at 5, n. 3, and Justice Souter, statement at 1.), Lucas came to the Court with a finding that all economically viable use of the property in question had been extinguished. *Lucas*, slip op. at 6. Nothing in any opinion in *Lucas* is inconsistent with the parcel as a whole concept articulated in *Penn Central* nor with that relied upon by the trial court in the case at bar. Secondly, the majority opinion in *Lucas* clearly contemplates that takings analyses should be made in light of the property owner's reasonable economic expectations at the time he acquires the property:

> Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. This accords, we think, with our "takings" jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire *when they obtain title to property*.
>
> *Lucas*, slip op. at 21, 22 (emphasis added, footnote omitted)

In the case at bar, Petitioners bought the 43 acre parcel containing the two acres of wetlands now sought to be filled several years after the restrictive regulations were

in place. Petitioners knew that a permit would be required to fill the two acres but subdivided and spent money on their property as though the permit had already been issued. Petitioners' own expert testified that the wetlands were of only nominal value before the regulations, after the regulations, and when they were acquired by Petitioners. Clearly, Petitioners' reasonable investment backed expectations were very different from those of the petitioner in *Lucas* who spent $975,000.00 on property that, *when he acquired it*, could be lawfully improved with two dwelling houses. *Lucas*, slip op. at 1. To the extent that *Lucas* breaks new ground – and it does not even purport to do so on the parcel as a whole issue sought to be reviewed by Petitioners – its holdings do not help Petitioners' cause.

Petitioners seem to argue that takings jurisprudence somehow made predictable and sensible by *Mahon*, became confused by this Court's holding in *Penn Central*. Petition at 12.[5] Actually, *Penn Central* merely made

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[5] Though certainly framed in terms of diminution of value, Justice Holmes' opinion seems largely to be animated by a view that the statute in question was an impermissible impairment of contract and did not bear a sufficient relation to public health, safety or welfare, i.e., "does not substantially advance legitimate state interests" *Agins v. Tiburon*, 447 U.S. 255, 260 (1980). In what might be characterized as his preliminary remarks, for example, he says that "[t]he extent of the public interest is shown by the statute to be limited, since the statute ordinarily does not apply to land when the surface is owned by the owner of the coal. Furthermore, it is not justified as a protection of personal safety." *Mahon*, 260 U.S. at 413, 414. His analysis of the statute is similar to that of the Montana Supreme Court in *Western Energy Company v. Genie Land Company*, 737 P.2d 478 (1987), discussed below.

express what had perhaps previously been implicit: that in evaluating the impact of a government regulation alleged to have resulted in a taking, the diminishment in value must be measured against the "parcel as a whole" – all of the land or the ownership rights reasonably related to that alleged to have been taken. Any other approach would require payment whenever a government regulation diminished the value of property and, in the words of Justice Holmes, "[g]overnment hardly could go on". *Mahon*, 260 U.S. at 413. Nevertheless, two of this Court's cases, *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) ("*Kaiser Aetna*"), and *Keystone Coal*, supra, are identified by Petitioners as examples in which the parcel as a whole considered by the Court was supposedly limited to only that directly regulated (according to Petitioners, a pond and marina in *Kaiser Aetna* and coal in *Keystone Coal*. Petition at 18 and 19). Petitioners' theory, of course, is that, by analogy, the Court should in the case at bar consider only the two acres of wetlands for which a permit to fill was denied in its takings analysis rather than the many and highly profitable acres of uplands which constituted the bulk of the parcel of which the two acres of wetlands were a part. *Kaiser Aetna*, though, is in no way parallel or similar to the case at bar. As Justice Scalia points out in *Lucas*, *Kaiser Aetna* is an instance in which the property owner was required "to suffer a physical 'invasion' of his property" (a navigational servitude). *Lucas* slip op. at 10. Such physical invasions consistently have been held to amount to takings with little further inquiry even where as, for example, in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the invasion was at most 1-1/2 cubic feet of the owner's

property. There is no such situation suggested in the case at bar. And in *Keystone Coal*, though the "relevant calculus" applied by the Court included only coal, since the complainants apparently owned nothing but mineral rights, it is clear that the "parcel as a whole" identified by the Court was as expansive as it could reasonably have been:

> When the coal that must remain beneath the ground is viewed in the context of any reasonable unit of petitioners' coal mining operations and financial-backed expectations, it is plain that the petitioners have not come close to satisfying their burden of proving that they have been denied the economically viable use of that property.
>
> *Keystone Coal*, 480 U.S. at 499.

It is easy and correct to analogize the two acres of wetlands in the case at bar to the coal pillars required to be left in the ground in *Keystone Coal*, and the balance of Petitioners' parcel which is developable (and which has, in fact, generated profit), to the "context of any reasonable unit of petitioner's coal mining operations and financially backed expectations." *Kaiser Aetna*, 480 U.S. at 499.

2. United States Courts of Appeals

Petitioners assert that "[t]he Supreme Court of Virginia has decided this important federal question in conflict with . . . some of the decisions of the United States Court's [sic] of Appeal [sic]". Petition at 8. If that is true, it is not made evident by the cases cited in the Petition. *Naegele Outdoor Advertising, Inc. v. City of Durham*, 844

F.2d 172 (4th Cir. 1988), is cited for the proposition that the "Fourth Circuit Court of Appeals does not agree with the Supreme Court of Virginia's view that non-regulated property is part of the 'relevant calculus' ". Petition at 19. This is a singularly inapposite citation since, in that case involving prohibition of commercial speech on billboards, the Fourth Circuit expressly states that the relevant calculus for evaluating the loss to the petitioners therein should include not only the billboards affected by the regulation but *all* petitioner's billboards in a geographical area exceeding even the jurisdiction of the regulating body of government, the City of Durham:

> Clearly the unit is not composed of the affected billboards, which, like the coal pillars in *Keystone*, do not constitute a separate segment of property for taking purposes. . . . If Naegele advertises cigarettes or any other product through sharing contracts that are nationwide or in other broadly defined markets, the unit of its affected property may be larger than in the business it conducts in the triangle area.
>
> *Naegele Outdoor Advertising*, 844 F.2d at 176[6] (citation omitted)

If *Naegele Outdoor Advertising* is any indication, the United States Court of Appeals for the Fourth Circuit would certainly agree with the Virginia Supreme Court in this case.

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[6] It is interesting to realize that in fact patterns like those in *Naegele Outdoor Advertising* where the regulation diminishes economic value of property not itself directly regulated, a more expansive parcel as a whole analysis could conceivably help the property owner rather than hurt him for takings purposes.

The only other Federal Circuit to which Petitioners refer (except for the Claims Court cases discussed below) is the Ninth. Here again, the citations chosen are so unpersuasive as to suggest that there must actually be serene uniformity in the federal circuits on the question raised by Petitioners. The earlier of the cases, *American Savings and Loan Association v. County of Marin*, 653 F.2d 364 (9th Cir. 1981), is essentially conceded by Petitioners to be inconsistent with this Court's holding in *Keystone Coal*. Petition at 20, citing *Zilber v. Town of Moraga*, 692 F.Supp. 1195, 1204 (N.D. Calif. 1988). Comparing it even academically to the case at bar, however, it is clearly distinguishable from and consistent with the holding of the Virginia Supreme Court here. In *American Savings*, the property owner, like that in *Lucas*, acquired his property under one set of regulations and subsequently had imposed upon him a far more restrictive regulatory scheme. In the case at bar, on the other hand, the regulations complained of had been in place for many years prior to Petitioners' acquisition of the affected property, obviously creating a very different and, for Petitioners, lower level of financially backed expectation. And, in any event, in the *American Savings* case, the court remanded for consideration of the question of whether two adjacent parcels, zoned differently, but under common ownership, should be deemed the parcel as a whole. The court was clearly influenced by the possibility that the parcel which was alleged to have been the subject of the taking may have been subjected to what is sometimes known as "spot" or non-uniform zoning, which would distinguish the case from *Penn Central* and other cases (as well as that at bar) where the parcels in question were affected by a

regulatory scheme of wide or uniform application. *American Savings*, 653 F.2d at 371.

The later Ninth Circuit case cited, *MacCleod v. Santa Clara County*, 749 F.2d 541 (9th Cir. 1984), decided after *Keystone Coal*, is totally consistent with the ruling in the case at bar, holding that it was proper to consider the value of an entire 7000 acre parcel in determining whether a denial of a permit to harvest timber from a part of it constituted a taking.

3. State Courts of Last Resort

. Petitioners cite cases from state courts in New Hampshire, Washington, Montana, California, New York, Delaware, New Jersey, South Carolina, Massachusetts, Michigan, and Pennsylvania purporting to show that "[c]onfusion, and inconsistent application of the 'parcel as a whole' doctrine to include or not include non-regulated property in the 'relevant calculus' since *Penn Central*, has also resulted in the state courts." Petition at 21. Contrary to what is contemplated by Rule 10 of the United States Supreme Court Rules, Petitioners cite a number of cases from courts which are not the courts of last resort in those states. Thus, we do not know how the respective courts of last resort would have ruled in *Aptos Seascape Corporation v. County of Santa Cruz*, 138 Cal. App. 3d 484, 188 Cal. Rptr. 191 (Cal. Ct. of App., 1st Dist. 1983); *St. Aubin v. Flacke*, 492 N.Y.S.2d 766, 109 A.D.2d 481 (Sup. Ct., App. Div. 1985); *Lewis v. New Castle County Board of Adjustment*, 601 A.2d 1048 (Sup. Ct. of Del. 1989); *American Dredging Company v. State Dept. of Environmental Protection*, 169 N.J. Super 18, 404 A.2d 42 (N.J. Sup. Ct., App.

Div. 1979), *Chase Manhattan Bank, N.A., v. State of New York*, 103 A.D. 2d 211, 479 N.Y.S.2d 983 (NY Sup. Ct., App.Div. 1984), *Gannett v. Lowell*, 450N.E.2d 1121 (App. Ct. of Mass 1983) (which in any event appears to be mistakenly cited since it is not a taking case), and *Jones v. Zoning Hearing Board*, 578 A.2d 1369 (Com. Ct. Pa. 1990), all cited by Petitioners, and those cases are, therefore, of little or no use in deciding whether a writ of certiorari is appropriate in the case at bar. It is worth noting that many of those cases are conceded by Petitioners to be consistent with the decision objected to in this case and, with one partial exception (a couple of the plaintiffs in *St. Aubin v. Flacke, supra*), all of the cases apparently involve property the use of which was restricted *after* acquisition by their owners. Accordingly, the financially backed expectations and, in the language of Justice Scalia, the "understandings of our citizens [in this case the Petitioners] regarding the content of, and the State's power over, the 'bundle of rights' that they acquire *when they obtain title to the property*", *Lucas*, slip op. at 21, 22, (emphasis added), were very different in the case at bar where Petitioners acquired their property long after a portion of their 43 acres had been made subject to regulation as wetlands. Those cases, not from state courts of last resort, will not be further addressed in this Brief in Opposition. None of the cases cited by Petitioners which *are* from courts of last resort suggest any conflict or confusion in the understanding or application by those courts of the parcel as a whole rule articulated by this Court in *Penn Central*.

Two cases from the Supreme Court of Washington are cited by Petitioners and nicely illustrate the deficiencies

of their presentation to the Court. *Allingham v. City of Seattle*, 749 P.2d 160 (1988), is a case which, in addition to being easily distinguishable from that at bar (the plaintiffs there apparently owned their property prior to the imposition of the ordinance complained of), was explicitly reversed by the Washington Supreme Court in *Presbytery of Seattle v. King County*, 787 P.2d 907 (1990), also cited by Petitioners. Petitioners state that *Allingham* was overruled because of this Court's rulings in *Penn Central* and *Keystone Coal*. Petition at 21. In fact, both *Penn Central* and *Keystone Coal* had been decided *prior* to the *Allingham* decision and in the later case, the Washington Supreme Court saw fit to remark that

> With the exception of this court's recent decision in *Allingham v. Seattle*, . . . neither state nor federal law has divided property into smaller segments of an undivided parcel of regulated property to inquire whether a piece of it has been taken or whether a due process violation had occurred with regard to a piece of regulated property. Rather, we have consistently viewed a parcel of regulated property in its entirety.
>
> *Presbytery of Seattle*, 787 P.2d at 914, 915.

In the *Presbytery of Seattle* case, the Washington Supreme Court approved denial of a permit to develop wetlands constituting only a part of a tract, other portions of which had value. Clearly, the *Allingham* case was an aberration, expressly overruled by the Washington Supreme Court, *Presbytery of Seattle*, 787 P.2d at 915, which unambiguously applies the parcel as a whole concept as it was

correctly applied in the case at bar by the Supreme Court of Virginia.

Petitioners likewise cite two cases decided by the Supreme Court of New Hampshire, neither of which is inconsistent with the ruling in this case. *Burrows v. City of Keene*, 432 A.2d 15 (N.H. 1981), dramatically demonstrates that the concept of regulatory taking developed by this Court is necessary, even where there is no physical invasion by the state. In that case, a property owner refused a below market value offer for his land from the city which coveted it for "open space". When the owner refused, the city rezoned 109 of the land owner's 124 acres as a "conservation zone". The Supreme Court of New Hampshire had no difficulty finding that a taking had occurred and awarded even attorneys' fees, finding it appropriate to remark that

> Planners and other officials should be aware of possible personal liability for bad faith violations of a landowner's constitutional rights which may go beyond the damages recoverable for inverse condemnation.
>
> *Burrows v. City of Keene*, 432 A.2d at 20.

It is truly difficult to understand how Petitioners think this case supports their position or is inconsistent in any way with the ruling in the case at bar. *Claridge v. New Hampshire Wetlands Board*, 485 A. 2d 287 (N.H. 1984), also cited by Petitioners, where the court approved denial of a permit to fill even where the denial essentially rendered the parcel unbuildable, though entirely consistent with the case at bar insofar as it affirms a permit denial, really

sheds no light one way or another on the question presented to the Court issue since what the parcel as a whole was does not seem to have been in controversy. On the other hand, the property owner in that case, like the Petitioners here, had bought his property after it had become subject to wetlands regulation and, to some degree, the New Hampshire Supreme Court anticipated Justice Scalia's thoughts in *Lucas*, slip op. at 21, 22, when it observed that

> A person who purchases land with notice of statutory impediments to the right to develop that land can justify few, if any, legitimate investment-backed expectations of development rights which rise to the level of constitutionally protected property rights.
>
> *Claridge v. New Hampshire Wetlands Bd.*, 485 A.2d at 291.

There can be no doubt that the New Hampshire Supreme Court would have affirmed the decision of the trial court in this case.

That Petitioners should cite *Western Energy Company v. Genie Land Company*, 737 P.2d 478, 227 Mont. 74 (1987), in support of their case is the next thing to an insult to the intelligence. A fair reading of that case reveals that the decision is grounded not on an analysis of diminution of economic value, though that is discussed, but, rather, on the fact that the "statute does not bear the requisite 'substantial relation to the public health, safety, morals, or general welfare.'". *Id.* at 481, quoting *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926). It is hard to see how the court could have ruled otherwise since

> The statute merely provides that when the owner of the minerals does not own the surface he cannot apply for a permit to mine without first receiving permission of the surface owner to enter and commence strip-mining operations on the land [even if the surface owner or his predecessor in interest had already contractually or otherwise conveyed the mineral rights, including the right to strip mine].
>
> *Id.* at 481.

Since the impediment to strip mining was the absence of permission of a private party and the statute did not even apply where mineral rights and surface rights were owned by the same party, the statute was appropriately viewed as an improper impairment of contract, outside the legitimate bounds of the police power, and declared unconstitutional. There is absolutely nothing in the opinion suggesting that the Montana Supreme Court would have decided the case at bar differently than did the Supreme Court of Virginia.

Neither case cited by Petitioners from the New York Court of Appeals is, to the limited extent comparable to the case under consideration, inconsistent with the ruling below. *Spears v. Berle*, 397 N.E.2d 1304, 48 N.Y.2d 254 (1979), was, as noted by Petitioners, remanded for evidence on the taking issue where the wetlands in controversy were only a portion of the larger parcel. Though it appears that the entire tract was to be considered the parcel as a whole, that issue was not explicitly addressed by the court. The second New York decision cited by Petitioners to which, amazingly, there were two dissents, is *Seawall Associates v. City of New York*, 542 N.E.2d 1059

(N.Y. 1989). There, the Court declared unconstitutional a statute that attempted to prohibit the

> demolition, alteration, or conversion of single-room occupancy (SRO) properties and obligates the owners to restore all units to habitable condition and lease them at controlled rents for an indefinite period.
>
> *Id.* at 1060, 1061.

The court found not only a regulatory taking but also a physical taking, 543 N.E.2d at 1062. Not surprisingly, though the case is extremely interesting, there was no discussion on the parcel as a whole issue, nor does the case indicate confusion or divergence of opinion from that of Virginia in connection with that issue.

One other state court of last resort, the Supreme Judicial Court of Massachusetts, is called upon twice in the Petition. Petitioners have somewhat distorted the holding in the first of those cases in order to seek the writ of certiorari. Of *MacGibbon v. Bd. of Apps. of Duxbury*, 255 N.E. 2d 347 (Mass 1970), (decided well before *Penn Central* or *Keystone Coal*), Petitioners say that it

> held that 'The preservation of privately owned land in its natural, unspoiled state for the enjoyment and benefit of the public by preventing the owner from using it for any practical purpose' was not authorized.
>
> Petition at 25 quoting 255 N.E.2d at 351.

The implication in the Petition is, of course, that the court was making a constitutional ruling pertinent to the case

at bar. In fact, the full quotation, of which Petitioners offered only a portion reads as follows:

> The preservation of privately owned land in its natural, unspoiled state for the enjoyment and benefit of the public by preventing the owner from using it for any practical purpose is not within the scope and limits of any power of authority delegated to municipalities under the Zoning Enabling Act.
>
> *MacGibbon v. Bd. of Apps. of Duxbury*, 255 N.E. 2d at 351.

The court, in other words, was construing a particular Massachusetts statute, not on constitutional grounds, later in the opinion expressly declining to rule on the question of whether a taking had occurred, and did not have any occasion to address the parcel as a whole question. *Id.* at 352. Though it still was not required to explicitly address the parcel as a whole question, the same court had no trouble finding no taking 11 years later in the second Massachusetts case cited by Petitioners where a denial of a permit to fill wetlands made about 55% of a parcel unbuildable. *Moskow v. Comm'r of Dept. of Env. Mgt.*, 427 N.E.2d 750 (Mass 1981). There was no suggestion that the wetlands should have been separated from the uplands for the takings analysis. It is abundantly clear that the Supreme Judicial Court of Massachusetts would rule in this case as did the Virginia Supreme Court.

Petitioners rely upon single cases from three additional states to show what they consider confusion on the parcel as a whole issue. In short, in none of them was a

taking found and none of them suggests a conflict among state courts of last resort on the question presented by Petitioners. Briefly, *Carter v. South Carolina Coastal Council*, 314 S.E.2d 327 (S.C.1984), approved the denial of a permit to fill wetlands but produced no discussion about what the parcel as a whole was in that case. In *Grand Forks-Traill Water Users, Inc. v. Hjelle*, 413 N.W.2d 344 (N.D. 1987), the Supreme Court of North Dakota found no taking after enactment of a statute prohibiting installation of utility lines within 75 feet of the center line of highways, especially where the complainant was seeking compensation for expenses incurred moving lines installed after the statute was in place. And in *Bevan v. Brandon Township*, 475 N.W.2d 37 (Mich 1991), the Michigan Supreme Court decided that two contiguous lots should be considered the parcel as a whole for the takings analysis. In that case, no taking was found and no wetlands were involved. However, the court addressed the subdivision aspect of the case in a way that is useful to the issue at bar and its remarks are worthy of extended quotation:

> [D]ivision of the property, "is not a fact or circumstance which affects or detracts from the reasonableness of the classification. If it were held to be so, the result would be that it would be competent for landowners to perpetually defeat zoning restrictions by crisscrossing their lands on a plat map with lines ostensibly dividing the same into parcels so small that each would be unsuited to any foreseeable use unless combined with others. The test of reasonableness may not be distorted or thwarted by any such artificial device." . . . "Artificial device[s]," such as tax identification numbers and separate

> deeds . . . are not controlling in determining whether enforcement of the ordinance in this case would amount to a taking.
>
> *Id.* at 43. (footnotes and citations omitted)

The correctness of this reasoning and its relevance to the case at bar are obvious. Acquiring 43 acres, some of which including the two acres here in dispute were subject to wetlands regulation, Petitioners voluntarily subdivided it in such a way as to isolate and minimize the value of the wetlands. Surely it would be unjust to now require Accomack County to reward Petitioners for the alleged consequences of their own actions.

Petitioners have cited not a single currently valid case decided by any state court of last resort that even implies that any state would decide the case at bar differently than did Virginia's Supreme Court.

4. United States Court of Claims

Finally, Petitioners advance the United States Court of Claims as manifesting more confusion about "parcel as a whole" and "relevant calculus["][sic] than any other body. Petition at 26. Since there is apparently very little confusion elsewhere, Petitioners' assertion may well be true and yet not mean much. Nevertheless, the Court of Claims cases cited do not support the Petitioners' argument that certiorari should be granted to resolve conflicts between federal courts of appeals. First of all, three of the opinions cited were not appellate decisions at all, namely *Florida Rock Industries, Inc. v. United States*, 8 Cl.Ct.160 (1988); *Loveladies Harbor, Inc. v. United States*, 15 Cl.Ct. 381

(1988); and *Ciampetti v. United States*, 22 Cl.Ct. 310 (1991). Of those cases, the latest, *Ciampetti*, is clearly on all fours with the trial court's holding in the case at bar. *Loveladies Harbor* is now on appeal and, in any event, involved land which was subjected to stricter regulation after acquisition by its owner. The *Florida Rock* case, where Chief Judge Kozinski had found a taking to have occurred, was reversed by the United States Court of Appeals, Federal Circuit. *Florida Rock Industries, Inc. v. United States*, 791 F.2d 893 (Fed. Cir. 1986). Petitioners attempt to retain some comfort from the case, however, by noting that the Appeals Court considered the appropriate unit for damages calculation to be only 98 acres for which a dredging permit had been sought as opposed to the entire 1560 acre tract owned by the complainant. Petition at 27. Truly, though, that comfort must be cold comfort indeed since the Court of Appeals was merely affirming the lower court's denial of a cross claim seeking damages for property which had not even been the subject of a permit request. *Id.* at 895. And again, it is significant that, unlike the case at bar, the regulations upon which the permit denial was based were enacted after the acquisition of the property in question. *Id.* at 895. Though *Florida Rock* is very different from the case at bar, there is no suggestion in *Florida Rock* that the Federal Circuit would have reached a different result in this case.

The remaining Court of Claims cases for which there have been appellate court consideration are entirely consistent with the decision of the trial court in this case and with that of the Virginia Supreme Court. The first, *Deltona Corporation v. United States*, 657 F.2d 1184 (1981), cert. denied, 455 U.S. 1017 (1982) (*"Deltona"*), approved denial of a permit

to dredge and fill wetlands based on a rather garden variety parcel as a whole analysis. Noting the many acres of the complainant's parcel that were developable even without the permit, the court deemed the case to "merely present an instance of some diminution in value." 657 F.2d at 1192, 1193. A very similar result was reached based on reasoning identical to that employed by the trial court in the case at bar in *Jentgen v. United States*, 657 F. 2d 1210, cert. denied, 455 U.S. 1017 (1982) ("*Jentgen*"), where the court found that the value of the developable portion of the claimant's property was sufficient to preclude a finding that its "property has been rendered valueless as the consequence of government regulation." *Id.* at 1213.

Grasping at a very thin straw, Petitioners attempt to distinguish *Deltona* and *Jentgen* from their case by alleging that

> The denial of just compensation in *Deltona* and *Jentgen* was predicated upon the fact that **both regulated wetlands and non-regulated uplands were combined in the permit applications** which were denied.
>
> Petition at 27 (emphasis in the original)

To be blunt, that assertion simply is not true or was clearly not a factor in the court's decision in either case. In *Deltona*, the court's analysis includes the observation that

> even within Barfield Bay and Big Key, there are located 111 acres of uplands which can be developed without obtaining a Corps permit and whose total market value is approximately $2.5 million.
>
> *Deltona v. United States*, 657 F.2d at 1192.

And in *Jentgen*, the court explicitly said of the applications that were denied that they

> related to approximately 80 acres of the Jentgen tract; the remaining 20 acres are uplands and can be developed without dredging and filling and, consequently, without the need for Corps authorization.
>
> *Jentgen v. United States*, 657 F.2d at 1212.

The fact of the matter is that no United States Court of Claims case which has survived appellate scrutiny is in any way inconsistent with the decision in the case at bar nor does any indicate "confusion" about the meaning or application of the terms "parcel as a whole" or "relevant calculus".

CONCLUSION

Petitioners expressly urge review of this case to resolve conflicts between the Virginia Supreme Court's decision in this case and those of the courts of last resort of other states as well as decisions of United States Courts of Appeals. In support of their petition, they have cited a hodge-podge of cases, including several from courts not of last resort, and have in some instances distorted the holdings in those cases. They have selectively stated the facts of this case, choosing to avoid facts which, if not critical to the decision, are certainly of interest to the Court, such as the facts that they purchased the property in question long after the regulations were in place and that the wetlands in question were,

according to their own expert, of only nominal value when acquired by them. Even with that approach, Petitioners have failed to validly cite a single case showing that any Federal Circuit Court of Appeals or state court of last resort would have decided the case at bar differently than did the Supreme Court of Virginia. While there will no doubt be many occasions for exploring the "relevant calculus" for "parcel as a whole" analysis, this case is surely not one of them.

For the reasons stated, Accomack County, Virginia, respectfully prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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